No. 80-381

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Supreme Court of the United States

October Term, 1980

JOHN DI GILIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. In a competency hearing pursuant to 18 U.S.C. §4244 is due process violated where the burden of proof is placed on defendant to prove the specific organic cause for incompetency rather than on the Government to prove competency in accordance with the *Dusky* test?

II. May a verdict of criminal guilt beyond a reasonable doubt stand where there is a reasonable doubt as to defendant's competency to defend himself?

PARTIES

The parties before the Third Circuit were the United States of America and petitioner John DiGilio. The other named co-defendants did not participate in the appeal to the Third Circuit.

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OPINIONS BELOW

A copy of the Third Circuit's opinion at 538 F. 2d 972 (1976) is appended. Although not the decision which is the direct subject of this writ, it was the decision which reversed the trial judge's original finding of competency and remanded with instructions for a *nunc pro tunc* determination of competency-to-be-tried, if possible, and a determination of competency throughout the trial and for sentencing.

Opinions relevant to this petition are the original determination of competency-to-be-tried rendered by the trial judge in an unreported decision dated June 19, 1975; a *nunc pro tunc* determination of competency throughout the trial in an unreported decision dated November 2, 1977 and a determination of competency to be sentenced in an unreported decision dated October 10, 1979. Copies of all three opinions are appended.

JURISDICTION

(a) The judgment sought to be reviewed was dated and entered July 15, 1980. It affirmed, without opinion, the conviction and sentence herein including the trial judge's *nunc pro tunc* determination that petitioner was competent to be tried and a second determination after a new hearing that petitioner was competent to be sentenced.

(b) By order dated and entered August 6, 1980 the Third Circuit denied a petition for rehearing but by order dated and entered August 15, 1980 stayed the mandate affirming his conviction and sentence until September 5, 1980 to permit this petition to be filed.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The right to counsel provision of the Sixth Amendment:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

18 U.S.C. §4244, a copy of which is appended hereto.

STATEMENT OF THE CASE

Petitioner was indicted by a federal grand jury (No. 74-314) for soliciting the theft of Government documents. The issue of his competency to be tried was raised and the trial judge, Hon. H. Curtis Meanor, sent him to Carrier Clinic for evaluation. A 18 U.S.C. §4244 hearing was then had in June of 1975.

Three psychiatrists testified at the hearing:

For the Government:

Dr. Spitzer, a board certified psychiatrist and clinical director of Carrier Clinic was hired by the Government. He examined 700 pages of medical records and psychological reports and spent 25 hours evaluating petitioner. He concluded that petitioner was not only not competent to stand trial but also was incompetent to handle his affairs and should be committed.

Dr. Flicker, board certified in both psychiatry and neurology was also hired by the Government and after reviewing the Carrier Clinic records and examining petitioner, he could not determine if he was competent or incompetent.

For the petitioner:

> Dr. Gagliardi, a Diplomate of Psychiatry and Neurology spent 25 hours examining petitioner and concluded that he was incompetent to be tried.

As Judge Meanor observed, "Two say he is incompetent and one says he can't tell" (6/19/75 T53).

In addition to the psychiatric testimony, Dr. Taub, a clinical psychologist (not board certified) (6/12/75 T23) testified for the Government. He had not seen petitioner at Carrier Clinic but had seen him for 45 minutes a year earlier when petitioner was at the medical center in Springfield, Missouri for evaluation in an unrelated matter (6/12/75 T96). Dr. Taub took part in group and individual psychological testing and prepared reports for the court (6/12/75 T7-T11).

All the doctors came to the conclusion that petitioner had organic brain syndrome (physical organic brain damage) (6/6/75 T79, 6/12/75 T18, 6/8/75 T130). An autopsy would show lesions of the nervous system (6/6/75 T80) and petitioner's conduct and test results were consistent with this diagnosis (6/6/75 T19, T66, T99). Dr. Spitzer characterized the syndrome as one with a psychotic reaction (6/6/75 T8). Dr. Flicker said the syndrome was chronic (6/18/75 T163) and thought there was superimposed on it a Ganser's Syndrome (6/18/75 T130). Dr. Taub diagnosed an organic psychosis (6/12/75 T28).

The doctors recognized that petitioner functions at a marginal level in terms of taking care of himself. His memory is incapable of keeping accurate track of any consecutive basis of recent events (6/6/75 T12). His personality is disorganized and he cannot arrange his thoughts and activities in any constructive, meaningful way (6/6/75 T14). His mentation is impaired

through distinct paranoid trends (6/6/75 T15) and he is unable to perceive abstract relationships and unable to concentrate (6/6/75 T16). In addition, his I.Q. is a below-average 68 (6/6/75 T20). He cannot play cards because he cannot remember what beats what (6/6/75 T129) and would get lost if he drove a car (6/6/75 T125).

The doctors recognized that the brain damage was traumatic in origin. Petitioner suffered multiple brain and brain stem injuries during his approximately 110 amateur and professional fights. During his career he was twice barred from the ring by the New York Athletic Commission because of head injuries. In addition, a tugboat accident in 1969 and subsequent numerous falls causing head injury caused additional brain damage (6/6/75 T13, T14, T89, T90, 6/12/75 T27, T28, T29). Dr. Spitzer diagnosed the falls as a result of Grand Mal, a form of epilepsy (6/6/75 T13). Dr. Gagliardi believed the organic illness to be dementia (6/6/75 T86) manifested by dysmesia (difficulty with short-term memory, disorientation as to time, place and person, along with difficulty in abstract reasoning). Dr. Gagliardi had personally observed that the seizures resulted in, or were accompanied by elevated blood pressure and heart rate, sweating, dysphasia and hypertension (6/6/75 T93). Dr. Flicker found the symptomology to definitely show not only the presence of organic brain syndrome, but also the manifestation of hysterical elements, and at times, some of the condition appears to be almost schizophrenic in character, and at other times explosive, almost manic (6/18/75 T134, T135). All the doctors considered and ruled out the possibility of malingering (6/6/75 T22, T65, T96, T97, T99, T100, T103, T110, T111, 6/12/75 T19, T31, T89, T114, 6/18/75 T130, T131, T132).

The Government also presented Dr. Lewis, an internist who had only seen petitioner on two occasions for a total of 20 minutes (6/6/75 T133-T138). The first occasion was October 29,

1974 when he saw petitioner in the Intensive Care Unit under sedation and the second occasion was May 1975 when he did not engage in any intensive questioning of petitioner (6/6/75 T149, T150).

Messrs. Armstead and Rockstein, both medical trainee associates at the Federal Detention Headquarters where petitioner was held, confirmed the fainting spells, dizziness, headaches, incoherence and hypertension (6/13/75 T154, T156, T157, T163, T164, T170, 6/16/75 T136, T138, T139, T150, 6/17/75 T50). Dr. Flores, another medical trainee associate, witnessed petitioner black out, manifest slurring speech and "go into another dimension . . . his eyes rolled back in his head" (6/18/75 T183). He sutured him at least twice from falls (6/18/75 T185) and said that petitioner had occasionally urinated on himself (6/18/75 T194). Sgt. Weingartner had also seen petitioner experience a seizure (6/18/75 T18).

Lastly, the court considered a 1974 report by Dr. Emasue Snow. Dr. Snow had also seen petitioner a year earlier at Springfield. She concluded competency to stand trial, but she never testified and her credentials were never made known to the court. Her report was included in the Springfield records which had been reviewed, and apparently disregarded by the three psychiatrists.

The trial judge recognized that petitioner "is extremely mentally deficient" (6/19/75 T72) yet found him competent to be tried. Disregarding all psychiatric experts — both Government and defense experts alike — all of whom were board certified and who spent scores of hours in personal examinations of petitioner, the trial judge adopted Dr. Taub's view ". . . that where Mr. DiGilio is outside a stressful situation he functions at his below-normal range of intelligence" (6/19/75 T77). The trial judge concluded:

> "I *suspect* — and if I have to *predict,* I would find — that Dr. Taub is correct. Once Mr. DiGilio gets behind him more testing by doctors, more testing by psychiatrists, once he recognizes that this hearing is over, that he must go to trial, that his only opportunity to protect himself is to cooperate with counsel, and understand what is going on, that he will rise above that retarded intellectual level. And *if he does,* and I think he will, he will *then* be able to understand the nature of the proceedings against him, understand counsel and cooperate in his own defense." (6/19/75 T79, T80) (Emphasis added.)

During the trial and despite the trial judge's "prediction" that petitioner would rise above his "extremely mentally deficient" condition there was clearly a thing "amiss". When the question of petitioner's taking the stand came up, counsel explained to the court the difficulty in obtaining rational consultation:

> "Mr. Hochieiser: He has made decisions to take the stand and there have been other occasions when I thought he had agreed with me that he ought not to, and then this morning I have enough trouble trying to tell him the jury is the same now as when we started in this case." (6/24/75 T19).

The trial judge's own attempts in this regard confirm the experience of counsel:

> "The Court: All right, have you come to a determination as to whether you want to testify or not?

Mr. DiGilio: Yes, I have to because half the time I don't know what is going on. That is the only way I can clear myself. Changing the jurors on me is not right." (T2415).

* * *

"The Court: Do you understand that we can't make you testify if you don't want to?

Mr. DiGilio: You make me do everything else.

The Court: No, no.

Mr. DiGilio: I don't understand." (T2416).

* * *

"The Court: . . . if you decide to get on that stand and testify then you will be subject to cross-examination by the United States Attorney.

Mr. DiGilio: I am not afraid of Mr. Cranwell or Mr. Robinson.

The Court: You will be subject to cross-examination by the United States Attorney on all subject matters pertinent to this case including the issue of whether you are telling the truth, your credibility.

Mr. DiGilio: I only tell the truth Judge." (T2417-T2418).

To the judge's last attempt to explain his rights petitioner responded "Judge, you confuse me more." (T2418). At the conclusion of the attempt, the judge remarked "The man can't think abstractly?" (T2418). Despite this clear evidence of a thing "amiss" the judge took no steps to investigate and when petitioner's wife finally convinced him not to take the stand, the court considered the matter finished (T2420).

The experience of counsel and the court was perfectly consistent with the psychiatric testimony at the §4244 hearing at which both Drs. Spitzer and Gagliardi opined that petitioner did not have the capacity to make such an abstract decision (6/6/75 T73, T74, T104). At the conclusion of the trial, petitioner was convicted and sentenced to 9 years incarceration and a $10,000 fine.

On appeal to the Third Circuit (No. 75-2218) the court vacated the sentence and remanded in accordance with its opinion at 538 F. 2d 972 (1976). It held, *inter alia,* that the trial judge had committed reversible error in placing the burden of proof on petitioner to prove incompetency and directed a redetermination, if it could be made on the record, with the proper allocation of burden of proof on the Government to prove whether petitioner was competent throughout the trial and for sentencing.

On November 2, 1977 the trial judge rendered a *nunc pro tunc* finding that petitioner was competent to stand trial based on his review of the record of the June 1975 competency hearing. The trial court also dealt with the "thing amiss" incident:

> "Nowhere in his history or in the record is there any credible evidence that he ever was hallucinatory. To believe that the jurors were being changed during the trial is a hallucination.

> That DiGilio suffered from hallucinations previously never has been suggested. The evidence is clear to me that DiGilio is not hallucinatory, and never has been.
>
> * * *
>
> It is incredible that DiGilio should suddenly have become truly hallucinatory for the first time during trial."

The trial court dismissed the thing amiss as simulation based on a clear misstatement of the record and without any hearing whatever. Numerous incidents of hallucinations were contained in the hospital records, psychiatric reports and expert testimony (*see* appendix).

On April 18, 1978 the district court initiated a new competency proceeding for the limited purpose of determining petitioner's competency to be resentenced pursuant to the mandate of the Third Circuit Court of Appeals. The trial court called Dr. Harold M. Somberg, a neurosurgeon, as its expert and not a psychiatrist as is required by 18 U.S.C. §4244. Dr. Somberg was paid by the Government and had originally been a Government witness (T1857).

Petitioner called Drs. Abrahamsen (of Son of Sam fame), Latimer, Kritzberg, Gagliardi, Brown, Smith, Rosner, Thaler and Feinberg as his expert witnesses and the Government called Drs. Feldman and Flicker. In addition, the Government used surreptitiously made recordings of conversations in which petitioner participated. Because of the trial court's ruling, it is not necessary to itemize the testimony of the many experts or to discuss the significance of the tapes or any infringement of

petitioner's Sixth Amendment rights under the doctrine of *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246 (1964) its progeny. Those rights however are not waived.

Essentially, the defense experts testified that petitioner was incompetent and the Government experts, although not as familiar with petitioner, disagreed. One of the defense experts, Dr. Rosner, a neurosurgeon, theorized that the *cause* of the incompetency was a type of blood vessel abnormality called "angioma". The vessels become engorged with blood and produce pressure on the brain. The trial judge reduced the entire proceeding into a determination as to whether or not Dr. Rosner was correct in his angioma theory and viewed as "incidental" all other evidence concerning whether or not petitioner was in fact incompetent *regardless* of cause:

> "Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist, it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant, the psychiatric and psychological evaluations made by the defense witnesses becomes *incidental* to the determination." (Emphasis supplied.)

In other words, the trial judge made the issue of competency to consult with counsel and understand the proceedings "incidental" to petitioner's ability to prove the *cause* of such incompetence. The trial judge then determined that petitioner was competent because he failed to prove the angioma. The rationale of that opinion motivated another writ of mandamus (No. 79-2583) which this court denied on November 13, 1979. On December 14, 1979 petitioner was

resentenced to a 9-month custodial term, a 5-year probationary period, and a $2,000 fine.

On appeal to the Third Circuit Court of Appeals, the trial court's ruling was affirmed, without opinion, by judgment order dated July 15, 1980. On August 6, 1980 the Third Circuit denied petitioner's application for rehearing and by order dated August 15, 1980 the Third Circuit stayed its mandate until September 5, 1980.

REASONS FOR GRANTING THE WRIT

I.

The writ should be granted because the Third Circuit sanctioned a radical departure from due process standards in the application of the *Dusky* test for competence by requiring petitioner to prove the organic cause of incompetency rather than placing the burden of proof on the Government to establish the existence of competency.

The Third Circuit's affirmation of the trial court's finding of competency to be resentenced violated petitioner's due process right to a fair trial as well as its own mandate that the burden of proof be placed on the Government to prove competency.

In *Dusky v. United States,* 362 U.S. 402, 4 L. Ed. 2d 824 (1960) the Court held that the test of competency-to-be-tried is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceeding against him" (362 U.S. at 402).

As the trial court observed: "It is clear that the Dusky test is applicable to a determination of competency to be resentenced."

The prohibition against proceeding against an individual who is incompetent is "fundamental to an adversarial system of justice", *Drope v. Missouri,* 420 U.S. 162, 172, 43 L. Ed. 2d 103 (1975) and failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial, deprives him of his due process right to a fair trial, *Pate v. Robinson,* 383 U.S. 375, 15 L. Ed. 2d 815 (1966). The *Dusky* standard is, consequently, a test of constitutional proportions and defines the limits of due process.

It is clear that the *Dusky* test is a functional test. It concerns only the *effects* of any mental disease, disorder or deficiency and is indifferent to the *cause* thereof. If an individual is not competent by that standard, he is not competent regardless of cause and regardless of whether cause is even known, yet the trial judge made the sole issue the organic *cause* of incompetency rather than the *fact* of incompetency and never addressed the latter in the hearing of competency to be resentenced. In his own words, he stated:

> "In deciding that DiGilio is competent to be resentenced, I find that the *determinative* testimony comes essentially from those witnesses who could testify knowledgeably about the claimed root *cause* of the defendant's problems — his organic brain disease." (Emphasis supplied.)

The hearing on competency to be resentenced was voluminous; the record consisting of 19 volumes of testimony and over 3,000 pages of transcripts of lay witnesses as well as psychologists, psychiatrists, neurologists and neuropsychiatrists. In essence, petitioner presented many experts who testified to the fact of his lack of competency to be sentenced. In addition,

he presented Dr. Rosner, a neurologist, who testified as to his theory of *why* petitioner was incompetent. He theorized that the *cause* of the incompetency was due to a type of blood vessel abnormality called "angioma". The vessels become engorged with blood and produce pressure on the brain.

The trial judge seized on Dr. Rosner's theory of cause and equated it with the ultimate issue of capacity itself: "It is clear to me that DiGilio's claim of incompetency rests entirely on the existence of the angioma". He then pitted Dr. Rosner's theory of cause against conflicting testimony by the Government's neurosurgeon, Dr. Somberg, accepted the latter's version and swept away *all* other evidence of the *actual* existence of incompetency:

> "Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant, the psychiatric and psychological evaluations made by the defense witnesses becomes *incidental* to the determination." (Emphasis supplied.)

In other words, the issue of whether or not petitioner was, in fact, competent to reasonably consult with counsel and understand the proceedings was "incidental" to his ability to prove the *cause* of such incompetence. It is interesting to note that Dr. Rosner's theory attempted to explain the epileptic attacks which petitioner experienced. The attacks were real and personally witnessed by Dr. Gagliardi who testified during the prior competency-to-be-tried hearing that they were accompanied by elevated blood pressure, elevated pulse,

sweating, dysphasia and hypertension (6/6/75 T93). Clearly a rejection of a theorized *cause* does not negate or even fairly address evidence as to *effect*. By analogy, a dead man does not become alive simply because a court rejects the theory of the *cause* of death.

Moreover, the trial court's rejection of petitioner's claim of incompetency based on his rejection of Dr. Rosner's angioma theory was irrational since the trial court knew and pointed out that petitioner was in fact suffering from some sort of organic brain disease:

> "There is no question in my mind that Mr. DiGilio has some form of organic brain disease, probably due to repeated head trauma from his pugilistic endeavors as well as some traumatic incidents that he has undergone since that time."

In other words, despite the trial court's knowledge that petitioner suffered from some form of organic brain damage he ruled that petitioner's failure to correctly identify the type of disease meant that he had no disease at all to support his claim of incompetency. This approach is pure sophistry inconsistent with petitioner's due process right to a fair trial.

The trial judge's approach was all the more unacceptable because of the present state of knowledge of the human mind and how it works. As Chief Justice Burger stated in his concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563, 45 L. Ed. 2d 396 (1975):

> "Despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood. . ."

To the extent that such knowledge does exist in a field of expertise designated by Congress to assist the courts in determining competency, the trial judge failed to utilize same. 18 U.S.C. §4244, which is the statutory basis for the competency hearings, specifies that the court "shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist who shall report to the court." The trial judge violated this mandate by using a neurosurgeon, Dr. Somberg, instead of a psychiatrist.

The trial judge's error in this regard was particularly inexplicable in light of the prior hearings he had conducted on petitioner's competency-to-be-tried. That hearing occurred *before* the introduction of Dr. Rosner and his theory of angioma, yet even the Government's own psychiatrist, Dr. Spitzer, joined with petitioner's psychiatrist, Dr. Gagliardi, in opining that petitioner was incompetent to be tried. There was no talk during that hearing or in the judge's determination that the psychiatric evidence was "incidental" to the ultimate issue.

That earlier hearing on competency-to-be-tried also underscores the fact that a competency hearing does not require any evidence whatever of underlying organic cause for incompetency. While it may certainly be helpful to present such evidence, if known, that aspect of the proofs can in no way alter the ultimate determination required by *Dusky*. To say otherwise, is to permit the tail to wag the dog at the expense of petitioner's due process right to a fair trial.

The Third Circuit's affirmance of the trial court's decision was, therefore, a failure to observe procedures adequate to protect petitioner's right not to be tried while incompetent, and, consequently, a deprivation of his due process right to a fair trial, *Pate v. Robinson, supra.*

Petitioner contends that the Third Circuit's affirmance was also erroneous because of the trial court's failure to apply the "beyond a reasonable doubt" quantum of proof to the competency-to-be-resentenced hearing. Petitioner relies on the arguments made herein on that point with respect to the competency-to-be-tried hearing.

II.

The writ should be allowed so that this Court can define the standard of proof necessary for a determination of competency under 18 U.S.C. §4244.

The Third Circuit erred in affirming the trial court's application of the preponderance of the evidence standard in redetermining that petitioner was competent to be tried. It is logically and, petitioner submits, legally inescapable that the correct standard is "proof beyond a reasonable doubt," or at the minimum "clear and convincing evidence."

The principle that no criminal liability can attach short of a finding of guilt beyond a reasonable doubt is as deeply imbedded in our system of jurisprudence as any can be. Such a standard reflects the values society places on individual liberty, *Addington v. Texas,* 441 U.S. ____, 60 L. Ed. 2d 323, 330 (1979).

It is logically inescapable that guilt can never be established beyond a reasonable doubt when there is a reasonable doubt as to a defendant's capacity to stand trial. This is so because competency to stand trial is, by definition, the ability to consult with counsel with a reasonable degree of rational understanding together with a rational and factual understanding of the proceedings, *Dusky v. United States,* 362 U.S. 402, 80 S. Ct. 788 (1960). When a defendant is incompetent, there can be no

question but that the defense itself is crippled. This Court commented on the problem in *Drope v. Missouri,* 420 U.S. 162, 43 L. Ed. 2d. 103 (1975):

> "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, may not be subjected to a trial. Thus, Blackstone wrote that one who became 'mad' after the commission of an offense, should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, *'for how can he make his defense?'*
>
> * * *
>
> Some have viewed the common-law prohibition 'as a by-product of the ban against trials in absentia' the mentally incompetent defendant, though physically present in the courtroom, is in reality *afforded no opportunity to defend himself.*
>
> * * *
>
> For our purposes, it suffices to note that the prohibition is *fundamental to an adversary system of justice* [citations omitted]." (420 U.S. 170-172, emphasis supplied.)

To say that the Government need only prove competency to stand trial by a preponderance, means, by definition, that a defendant may permissibly be forced to trial when a reasonable doubt exists as to competency, *i.e.*, when a reasonable doubt exists, whether he is afforded an "opportunity to defend himself."

When a defendant cannot reasonably assist counsel, ammunition necessary for the defense is lost. The problem is exacerbated by defendant's lack of incentive to utilize whatever capabilities he has due to his failure to grasp the nature of the proceedings against him. As a practical matter, this means that most, if not all, of the many procedural and substantive protections available to a defendant are lost or impaired. For example the right of confrontation can be no more meaningful than the ability to *effectively* confront the Government's witnesses. Another example is the right to the effective assistance of counsel. Certainly any counsel's effectiveness would be seriously impaired under such circumstances.

The significance of the loss or impairment of these and other constitutional rights in the trial of an incompetent, is underscored by the fact that on appellate review when a defendant has been deprived of his basic constitutional rights consistent with *Chapman v. California,* 386 U.S. 18, 17 L. Ed. 2d 705, *reh. den.,* 386 U.S. 987, 18 L. Ed. 2d 241 (1967), the prosecutor must demonstrate that the constitutional error was harmless "beyond a reasonable doubt" in order that the conviction not be reversed, 17 L. Ed. 2d at 710-711. (*See* 3 Wright, Federal Practice and Procedure—Criminal, Section 855, especially footnote 65 and 76.) It makes little sense to say that courts will zealously guard against the effects of constitutional error by utilizing the "beyond a reasonable doubt" standard on appeal, yet invite the wholesale loss or impairment of

constitutional rights in the first instance, by placing defendant in jeopardy where a reasonable doubt exists as to his ability to defend himself.

Certainly utilization of the beyond a reasonable doubt standard in the first instance at trial to protect constitutional rights, is no novelty. For example, in *Shilling v. State,* 86 Wis. 2d 69, 271 N.W. 2d 631 (1978), the court held that any waiver of the right to counsel during interrogation must be proven "beyond a reasonable doubt." That example is, of course, particularly pertinent here since it deals with Sixth Amendment rights.

This Court's recent decision in *Addington v. Texas,* 441 U.S. ____, 60 L. Ed. 2d 323 (1979), points to the same result urged by petitioner. In that case, it was held that the "clear and convincing" standard of proof, was a constitutional requisite consistent with the Fourteenth Amendment due process clause in a state involuntary commitment proceeding. The underlying rationale is no different than in criminal cases: to minimize the risk of an erroneous decision which will result in a loss of liberty. Certainly it is no less repugnant for an innocent defendant to be sent to jail than for a sane person to be involuntarily institutionalized. The liberty of one cannot be more sacred than that of the other. Moreover, any attempt to differentiate the two on the basis of the outstanding criminal charge would run afoul of a defendant's right to a presumption of innocence. In addition, the type of determination is very similar in both cases and since the nature of the proofs involved and the risks of error and potential loss of liberty are all strikingly similar, *Addington* strongly militates in favor of petitioner's position.

Another strong similarity between the *Addington* situation and §4244 hearings is that liberty is in jeopardy in both cases on

the basis of the evidence on competency alone and wholly without regard to any criminal charge. This is so because 18 U.S.C. §4246 provides that upon a finding of incompetency to stand trial the defendant may be deprived of liberty. Clearly, at the very least, the "clear and convincing" standard should be applied to §4244 hearings.

Consequently, this writ should be affirmed to permit this Court to determine this fundamental issue which affects the trials of many criminal defendants.

CONCLUSION

For the above stated reasons it is respectfully urged that the writ be granted.

Respectfully submitted,

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Of Counsel and
On the Brief

No. 80-381

Supreme Court, U. S.
FILED
SEP 5 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

JOHN DI GILIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX FOR PETITIONER

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APPENDIX A — INDICTMENT NO. 74-314

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 74-314

Title 18, United States Code, Sections 371, 641 and 2

UNITED STATES OF AMERICA

vs.

JOHN DiGILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KLIMANSKY) KUCZYNSKI

ORIGINAL FILED
Aug 6 1974

Angelo W. Locascio, Clerk

The Grand Jury in and for the District of New Jersey sitting at Newark charges that:

COUNT I

1. The defendant, John Di GILIO, during the period between on or about May 6, 1970 to on or about February 22, 1973, was a subject of an investigation by the Federal Bureau of Investigation of alleged loansharking activities.

Appendix A

2. The defendant, IRENE (KLIMANSKY) KUCZYNSKI, was at all times mentioned in this indictment, an employee of the Federal Bureau of Investigation; to wit, a clerk-typist in the Newark Field Office and as such had access to certain confidential files of the Federal Bureau of Investigation, including those relating to the then pending investigation of the alleged involvement of defendant JOHN DiGILIO and others in loansharking activities.

3. The defendant, GEORGE KUCZYNSKI, was at all times mentioned in this indictment, romantically involved with IRENE (KLIMANSKY) KUCZYNSKI.

4. The defendants, JOHN GRILLO, HARRY LUPO and PETER SZWANDRAK, were at all times mentioned in this indictment, associates of the defendant JOHN GRILLO.

5. From at least as early as November 1, 1971 and continuously thereafter to on or about August 31, 1972, the exact dates being unknown to the Grand Jury, in the State and District of New Jersey and elsewhere, the defendants herein:

JOHN DiGILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KLIMANSKY) KUCZYNSKI

did knowingly, wilfully and unlawfully conspire, combine, confederate and agree with each other, and with others, to (1) defraud the United States in that the defendants knowingly, wilfully and unlawfully conspired, combined, confederated and

agreed to impair, obstruct, and defeat the lawful function of the United States Department of Justice to conduct an investigation of alleged loansharking activities in violation of federal law by illegally and surreptitiously removing photocopies of official Federal Bureau of Investigation files relating to that investigation and to JOHN DiGILIO; and (2) commit an offense against the United States in violation of Title 18, United States Code, Section 641, in that the defendants knowingly, wilfully and unlawfully conspired, combined, confederated and agreed to steal, purloin, and knowingly convert to their own use records of the United States; that is, photocopies of official files of the Federal Bureau of Investigation, of a value in excess of $100.00.

6. It was a part of said conspiracy that JOHN DiGILIO, after he became aware of the fact that he was the subject of an investigation by the Federal Bureau of Investigation of alleged loansharking activities in violation of Federal law, sought to gain access to Federal Bureau of Investigation files which might reflect the extent of the Federal Bureau of Investigation's knowledge of his activities and the activities of certain of his associates.

7. It was further part of said conspiracy that JOHN DiGILIO, having determined that IRENE (KLIMANSKY) KUCZYNSKI was an employee of the Federal Bureau of Investigation, instructed JOHN GRILLO, HARRY LUPO and PETER SZWANDRAK to approach GEORGE KUCZYNSKI to determine whether IRENE (KLIMANSKY) KUCZYNSKI would surreptitiously obtain certain information and copies of documents from the Federal Bureau of Investigation files.

8. It was a further part of said conspiracy that, as a result of certain activities on the part of JOHN DiGILIO, JOHN

Appendix A

GRILLO, HARRY LUPO, PETER SZWANDRAK and GEORGE KUCZYNSKI, IRENE (KLIMANSKY) KUCZYNSKI agreed to obtain surreptitiously certain information and copies of documents from the Federal Bureau of Investigation files and did thereafter do so on at least four occasions.

9. It was a further part of the said conspiracy that the defendants would perform other acts for the purpose of hiding and concealing and causing to be hidden and concealed the purpose of their acts in furtherance of the conspiracy.

OVERT ACTS

In furtherance of the conspiracy set forth above, and in order to effect the objects thereof, the defendants did commit and cause to be committed the following overt acts:

1. In or about November, 1971, defendants PETER SZWANDRAK and JOHN GRILLO met with the defendant GEORGE KUCZYNSKI.

2. In or about March, 1972, the defendant JOHN DiGILIO met with defendant GEORGE KUCZYNSKI.

3. Between in or about November, 1971, to in or about June, 1972, the defendant PETER SZWANDRAK met with the defendant HARRY LUPO.

4. Between in or about November, 1971, to in or about June, 1972, the defendant IRENE (KLIMANSKY) KUCZYNSKI met with the defendant GEORGE KUCZYNSKI.

All of the above in violation of Title 18, United States Code, Section 371.

COUNT II

1. Paragraphs 1, 2, 3 and 4 of Count I of this indictment are hereby realleged and incorporated as though set forth in full.

2. Commencing on or about November 1, 1971, to on or about June 30, 1972, the defendants herein:

JOHN DiGILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KLIMANSKY) KUCZYNSKI

did, in furtherance of the conspiracy charged in Count I of this indictment, knowingly, wilfully and unlawfully steal, purloin, and knowingly convert to their own use records of the United States; that is, photocopies of official files of the Federal Bureau of Investigation, of a value in excess of $100.00.

In violation of Title 18, United States Code, Sections 641 and 2.

A TRUE BILL

_____

FOREMAN

/s/ JONATHAN GOLDSTEIN
JONATHAN L. GOLDSTEIN
UNITED STATES ATTORNEY

APPENDIX B — ORAL OPINION OF JUSTICE H. CURTIS MEANOR IN TRANSCRIPT OF PROCEEDINGS DATED JUNE 19, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[SAME TITLE]

* * *

THE COURT: All right. Gentlemen, this is the conclusion of a hearing regarding the competency of the defendant, John DiGilio, to stand trial.

The hearing was occasioned pursuant to a motion filed some months ago. We have had this hearing for approximately two weeks. We have heard the testimony of many witnesses, including three psychiatrists, one internist, one clinical psychologist. We started the hearing, I believe, on June 5th. So it has gone approximately two weeks.

Mr. DiGilio is a defendant under two indictments in this court. The indictment which was scheduled to be tried first, and prior to which this hearing was occasioned, alleges that Mr. DiGilio conspired to and in fact, aided and abetted in the theft of Government documents.

Briefly stated, it appears from the indictment that Mr. DiGilio, while under an investigation or indictment for loan sharking — that is, extortionate extension of credit — through the co-defendants, engineered the theft of documents about him from FBI files.

Appendix B

The second case, as I understand it, which at the present time is scheduled for trial in late September of this year alleges that in relation to the loan sharking trial before Judge Barlow, Mr. DiGilio, his attorney, Mr. Verdiramo and others secured some bugging devices, bugged Mr. Verdiramo's office, and, without the knowledge of Mr. Rubin, bugged his office, too, Mr. Rubin being an attorney for another defendant in that case.

The Court was then notified of these events and an attempt was made to blame the Government for the illegal bugging of attorneys' offices, and thus to seek a vitiation of the indictment. That, I think, is a fairly accurate and shorthand summary of the two charges that are pending against Mr. DiGilio.

Mr. DiGilio was tried before Judge Barlow in a long trial last October and November and was acquitted of the loan sharking charges at that time.

A motion was made to have Mr. DiGilio declared incompetent to undergo that trial.

After study in Springfield, Missouri, at the Federal Medical Institution there, and after a hearing before Judge Barlow, began, as I understand it, before he was sent to Springfield and concluded after his return, Judge Barlow decided that Mr. DiGilio was competent to undergo the trial he did undergo last fall.

I think it is agreed by counsel that on this motion the applicant — that is, the defendant DiGilio — bears the burden of proving his incompetency to stand trial by a preponderance of the evidence.

Appendix B

I view the matter solely as question of fact for me to decide by interpretation of the proof before me that I find to be credible.

The legal standard of competency to undergo trial is necessarily a general one. I don't think any precise standard could be formulated because of the variables of each defendant's mental condition.

I think the legal test is well stated in Dusky versus the United States, 362 U.S. 402, 1960, as it is anywhere else. The test is, and I quote "Whether he" — meaning the defendant — "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual understanding of the proceedings against him."

I don't think we can evolve any more particularized standard than that.

In the discussion of the evidence I think we have to start somewhere. We first start with the proposition that Mr. DiGilio does have organic brain disease, the nature and the extent of which is not determinable to any precise degree. Mr. DiGilio has a history of being a professional as well as amateur boxer. Somewhere in one of the records before me there is a statement to the effect that he had approximately seventy amateur bouts and approximately forty professional bouts.

There is also a statement by way of medical history that twice he was suspended by the Athletic Commission, I presume the New York Athletic Commission, but I do not know, because of head injuries engendered by his fighting endeavors.

Appendix B

I don't think there can be any doubt at all that to some extent Mr. DiGilio has organic brain disease related to his pugilistic history and perhaps also to certain traumatic episodes that followed his cessation of professional boxing.

There are two mentioned in the records before me. One was a fall from a tugboat in which he reportedly had a head injury, and the second was an automobile accident.

There is a history before me in the records that as a result of litigation for the tugboat injury he received a settlement, or a judgment, I do not know which, of $48,000 and as a result of the automobile accident he received a settlement or a judgment in the amount of $5,000.

I think, too, we can start with the events that transpired last summer while Mr. DiGilio was at Springfield and last fall before Judge Barlow. Mr. DiGilio was at Springfield for a considerable period of time, I believe June to September. He was given a workup there by Dr. Taub, who testified in this proceeding.

He was psychiatrically studied by a doctor named Emasue Snow. The conclusion of Dr. Snow after intensive examination and study of Mr. DiGilio at Springfield, Missouri, was that — and I quote from her report dated July 17, 1974, on a dictation two days earlier — "This patient is fully competent to stand trial. His behavior is conscious and purposeful and represents malingering in an attempt to avoid a legal proceeding."

The government would have it that Mr. DiGilio, despite the conclusion at Springfield, upon his return to the East, and his confinement to the Federal Detention Headquarters in West Street, continued his attempt by way of simulation of

symptomotology to avoid the trial, since both the trial later concluded before Judge Barlow and the two indictments pending before me were also then pending, and to bolster this contention of the government the government produced the testimony of one Nathan Lemler.

Lemler, for want of a better description, is a flim-flam man. He's about as trustworthy as a fox in a chickenhouse. He was in the West Street Jail as a government witness following a New York State Court conviction for the obtaining of money by false representation.

Mr. Lemler, by his own admission, took sums of up to $30,000 in order to engineer the entry into medical school of male students desirous of avoiding the draft. To this end he utilized some of these funds to bribe, he says, medical school deans and admission officers.

He was convicted in New York on charges arising out of his taking money under such representation, the conviction being on the basis that his representation that the money would be used in the good faith attempt to place these students in medical school was a false one, and I gather false when made, with no present intention to carry out the promise.

Lemler's positions regarding the merits of that New York proceeding are rather curious. He blames Mr. Hyman Greenberg, the lawyer he had over there, for not defending him properly.

He contends that the New York Attorney General seized four cartons of records, but only two showed up in court, and when he attempted to get the latter two the Attorney General, or his representatives, did not produce them.

He claims that these latter two boxes of records would show that he had an ancillary promise with his accusers in the New York action. The ancillary promise was that if he couldn't get their sons into medical school he would then keep them out of the service.

He admits to having bribed some Army or Selective Service personnel to this end. He says that his New York case should have been defended on the ground that he was giving full consideration for the payments made by those victims who testified against him.

I can appreciate Mr. Greenberg's problem in defending the New York case by talking Mr. Lemler into a Federal offense. After his conviction Mr. Lemler went to Dannamora, the New York confinement, totaling, I believe, four or four and a half years to fourteen years. He made an effort to extricate himself by getting in touch with Federal authorities. He says that he was instrumental in convicting at least one Army colonel or Selective Service individual who accepted a bribe from him. The reason he was in West Street last fall was that he was a cooperative government witness, I gather, in that proceeding.

According to the evidence before me, not from Lemler, but from one other witness, Mr. Stevens, who I believe was an MTA at West Street, I thought Lemler had been a chemistry professor of his and addressed him as doctor, a status that Lemler did nothing to dispel.

Lemler admits he wasn't a Ph.D. in chemistry, but he says he was a doctor of chiropractic, having studied chiropractic in New York and apparently was licensed in another state, New Hampshire, and having practiced chiropractic in New York for some years.

He says that DiGilio spoke with him about his problem, that he agreed to coach DiGilio with the simulation of the symptoms of organic brain disease. He knew the symptoms both from his chiropractic experience and he knew the symptoms from having read up on them in the small medical library at detention headquarters, particularly the Merck manual.

He would have it that he taught Mr. DiGilio how to fake a petit mal episode, taught Mr. DiGilio how to faint, not overact, not ham it up too much.

He says that the consideration for his engaging in these endeavors was that Mr. DiGilio was going to procure an attorney for him to help him do a number of things. First, set aside his New York conviction and, second, obtain some money he had coming from the death of his wife by reason of her insurance policy.

Mr. Lemler was a suspect in the murder of his wife. He admits that. He claims that fifty some thousand dollars in insurance proceeds arising out of his wife's death is being tied up and a civil proceeding is needed to free that money to him.

There can't be any doubt about the fact that Mr. Verdiramo, who testified here, was Mr. DiGilio's lawyer, met Mr. Lemler in New York at the Federal Detention Headquarters, undertook through Mr. Mottler to investigate his case briefly, and thereafter referred to Mr. Lemler's matter to Mr. Hochheiser, a member of the New York bar.

There also can't be any doubt that Mr. Hochheiser, at least for some period of time, attempted to investigate or look into the Lemler matter.

Appendix B

Mr. Hochheiser says that he was intrigued by the mention of a large sum of money easily available from the insurance proceeds of the late Mrs. Lemler, which could then be used as a legal fee to take an appeal and attempt in other ways to perhaps extricate Mr. Lemler from his legal involvements with the New York State authorities.

Mr. Hochheiser testified that he looked into the Lemler matter and it didn't turn out to be as easy as Mr. Lemler had painted it. There seemed to have been a necessity for the sum of $14,000 to pay for transcript. Mr. Lemler claimed he had no money. The Legal Aid in New York, which I take it is an analog to our Public Defender system here in New Jersey, was attempting to represent Mr. Lemler. That attempt was met with resistance by the New York authorities on the ground that Mr. Lemler had a cache that he could use to pay for legal fees, and Mr. Hochheiser, I think quite wisely, determined to leave the matter to the Legal Aid and not get involved in what seemed like an unprofitable endeavor.

The important point here is that, according to Lemler, Mr. Hochheiser knew of his instructions to Mr. DiGilio and that Mr. Hochheiser desired to be and was kept informed of Mr. DiGilio's progress as a pupil of Mr. Lemler in the simulation of organic brain disease or some sort of mental disease that would get him out of going to trial.

It is quite clear, however, that everyone at the Federal Detention Headquarters that had any acquaintanceship with Mr. Lemler knew why he was there, that he was there as a cooperating federal government witness, and he was leaving periodically, of course, to go be interviewed by federal authorities or testify for the government in the pending case.

Appendix B

I'm afraid for the Government I can attach little or no credibility to Mr. Lemler's testimony. I think Mr. Lemler is prevaricating. he's prevaricating about Mr. DiGilio just as he has prevaricated everything else in his life, including the making of a bigamous marriage. Whatever Mr. Hochheiser may be, he didn't strike me as being stupid. I cannot imagine a lawyer for Mr. DiGilio, who is as experienced as Mr. Hochheiser is, in the representation of criminal defendants, enlisting the aid of a known Government informer in order to obstruct justice by having that informer coach his client in the symptoms of organic brain disease.

Mr. Hochheiser, if he knew about it, would have done the only thing any rational lawyer could have done, and told Mr. DiGilio to get as far away from Mr. Lemler as he possibly could, because with Mr. Lemler's propensity for vocalization, there was just no way that this coaching by Lemler could be kept from being known by officers of the Federal Government.

What I find happened is this: DiGilio and Lemler were in the institution. They knew each other. They were running amuck in the hospital ward. Lemler had access to DiGilio's records, and he strikes me as being a pretty nosey person. I think it quite likely that DiGilio and Lemler had some discussion about their respective ailments. People who are confined in an institution like that get to know each other pretty well and have to have something to talk about. One of the favorite topics of conversation is, of course, the ailments that have led them to be confined. I am sure Lemler talked about his coronary disease and DiGilio talked about his trouble.

The medical record of DiGilio I think very clearly was very accessible to even the inmates like Lemler, who wanted to get in

the pharmacy to get it. Right in that medical record is the statement of Dr. Snow that the defendant DiGilio is a prevaricator. Lemler is certainly bright enough to read and understand it.

He also knew that DiGilio was attempting not to go to trial in Trenton by virtue of common gossip, because of his brain disease was seeking to be declared incompetent. Lemler knew this. I think Lemler lied to the Government about his coaching of DiGilio in order to curry favor with the Government.

He is smart enough to know that if he told one U.S. Attorney in the Southern District that he was helping DiGilio, a defendant in whom the Government had a great deal of interest, to simulate the symptomotology to get out of trial, that information would quickly find its way to the U.S. Attorney in Newark, as it did.

Lemler's story just doesn't hold up. It is not reasonable. It is not rational. It is not corroborated by any of the other witnesses that testified, who viewed both Lemler and DiGilio in West Street, and because of Lemler's background and criminal convictions, his motive, his whole history of dishonesty, I just cannot believe him, particularly that he coached DiGilio in the symptoms of brain disease. I think he knew that DiGilio was thought by the Government to be a faker and he has projected and expanded upon that in order to gain advantage for himself.

I think it's safe to say for purposes of my decision in this case that we can take Dr. Lemler — I won't use the language Mr. Querques did a few minutes ago in talking about him — we can put his testimony on the side.

Appendix B

I think I have to reiterate that in a determination of DiGilio's competency it is not a medical decision. It is a legal decision. I appreciate the psychiatric testimony, but I cannot be controlled by the ultimate conclusions of the psychiatrists.

We have Dr. Spitzer who believes Mr. DiGilio is incompetent to stand trial and who believes that he is a candidate for institutionalization. We have Dr. Gagliardi who treated him for at least two years, who believes that he is incompetent to stand trial but not a candidate for institutionalization and who, therefore, exists in some kind of psychiatric limbo, being not commitable, on the one hand, and not competent to answer criminal charges against him on the other.

We have Dr. Flicker, an extremely experienced and able psychiatrist, well-known in medical-legal circles in this State, who on the basis of his studies, his study of various records, is unable to come to any definitive determination of DiGilio's competency at this time.

I found very useful the testimony of Dr. Taub, who is a clinical psychologist, and who examined Mr. DiGilio extensively while he was at the Springfield institution.

Mr. DiGilio does not do well on psychological or psychometric testing. He shows a borderline retarded intelligence range. Yet Dr. Taub feels, and I believe Dr. Flicker said the same thing, that his intellectual capacities are higher than those revealed by the testing.

I think the general consensus is that despite the results of testing, Mr. DiGilio's functions are somewhere in the low

normal range of intelligence. The testing would indicate that his functional ability is somewhere at the mildly retarded level.

Now, why doesn't Mr. DiGilio do well in testing? Mr. DiGilio has organic brain disease, and he knows it. Dr. Taub talked about ego destruction or an impairment of Mr. DiGilio's ego if he attempted to do well on the test and did not. He does not want to recognize the extent of his illness or he is afraid, perhaps, to be in a position where he must recognize its seriousness and extent.

Therefore, he tends to slough off the tests, not make a bona fide attempt to do well on them for fear that he will fail calamatously and thus have to recognize concretely that he is extremely mentally deficient.

I think that there is another combined reason why Mr. DiGilio does not do well on the testing. Dr. Snow at Springfield felt he was simulating.

Dr. Flicker, although he can't give us a concrete opinion as to whether the man is competent or not, does feel there is some simulation, some malingering, some conscious effort to appear sicker than he actually is in Mr. DiGilio's reactions.

Of course, he has a motive to simulate. He is attempting to persuade this Court and attempted to persuade another Judge of this court last fall that he is in fact incompetent to stand trial.

I don't think the case of Mr. DiGilio is as simple as out-and-out malingering, on the one hand, and pure organic brain disease on the other.

Appendix B

It is unfortunate we don't know more about men's minds than we do. It is unfortunate that psychiatrists cannot be of more concrete help than they are.

In this case it is another example of the frustrations of the law in trying to get some rather black-and-white precise definitions out of the psychiatrist. Apparently, this branch of medicine isn't that sophisticated at this time.

The lay testimony indicates that Mr. DiGilio can function at least at some minimal self-sustaining level. The evidence indicates to me that he has for some period of time up until the recent past lived alone in an apartment in New York or perhaps with one other person, and that at these times he is able to manage his own affairs, take care of himself and maintain a satisfactory self-sustenance.

I infer from the evidence that he occasionally visits his family. We have not heard from any people with whom Mr. DiGilio has been intimately associated recently, except the last witness, and his recent socialization with Mr. DiGilio does not indicate to me that he had anything useful to offer about Mr. DiGilio's habits, patterns or life style at the present time. He testified to remote events of a bizarre nature, but they are entitled to less weight because of their remoteness.

The evidence at the F.D.H. Hospital wing, both through the records and through the testimony of those there who testified, demonstrates quite clearly that Mr. DiGilio had certain episodes where he fell down or he sustained self injury and banged his head.

Appendix B

He was on two occasions removed to two different New York hospitals, once to St. Vincent's and once to Bellevue, because of these events. One appears to have been some kind of an epileptic form or alleged epileptic form seizure, and the other seems to be some sort of coronary spasm. It is significant that with respect to the alleged coronary arrest or coronary attack, he was returned the same day by St. Vincent's, the electrocardiogram showing no changes.

I might point out, too, that Mr. DiGilio's symptoms of organic brain disease are almost entirely subjective. This is borne out very clearly by the records. You need only refer to Dr. Ruggiero's neurological examination upon his entry to the Federal Detention Headquarters. He has had electroencephalograms none of which show any diffuse or focal brain abnormality.

Dr. Flicker says, and I have to agree with him, that it is not inconsistent with competency for individuals under stress to engage in self-injury or self-destructing activity in order to avoid on-coming, unpleasant experiences. He gave some examples, I could give other examples, I think based on both my experience as a lawyer and as a Judge.

In support of the Government's position that Mr. DiGilio was consciously engaging in self-injury to further his end of avoiding trial is the proposition that he's a former prizefighter. He historically submitted himself to severe physical punishment, i.e., beatings in the ring to obtain desireable ends. According to the history he was set down once for a head injury and again for a head injury yet went back to take more punishment.

Appendix B

He is a man who is used to physical injury, who has had many physical injuries and, I think, the prospect of a few stitches or a transient episode of pain is by no means alarming to him as it would be to someone who has not undergone physical pain, and stresses which were Mr. DiGilio's way of life for many years.

Coming to the conclusion that I think I must on this record, I find that Mr. DiGilio has organic brain disorders; that his present medical status where he functions at a mildly retarded level are of a combined result of that disease and its effect upon him; his ageing process and a little simulation on his part, which simulation is based on two motives: first, ego protection, as Dr. Taub clearly spelled it out; and secondly, a desire to avoid undergoing these legal proceedings.

It's interesting also that Dr. Taub found, I find him to be correct, that where Mr. DiGilio is outside a stressful situation he functions at his below normal range of intelligence. That is where he is not being tested he doesn't seek to thwart the test for ego protection or where he doesn't have a motive to simulate as when he's being tested for competency to stand trial he can function at a higher range and more efficient range.

I asked Dr. Gagliardi some questions at the beginning as to what in his opinion Mr. DiGilio could and could not do. Without repeating them, they are in the record, Mr. DiGilio can do those simple things that are required of one who wants to maintain himself.

Is he, because of his mental condition, a danger to himself or others? I think the answer to that must be in the negative.

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Is he able to manage his own affairs? Yes, I think the answer to that must be in the positive. He is not the man who one would hire to be a business manager, he is not an individual who can engage in self-management in any sophisticated level, but he can live. He can get about. He can handle money to a limited extent. And I'm sure that he could live alone and maintain himself.

He keeps himself neat and clean, he eats by himself, he takes care of his bodily functions, he can converse, he can understand to a limited extent. And I agree with Dr. Gagliardi, and I agree with Dr. Flicker, that this man would not be involuntarily commitable in his present mental state. He may not function as efficiently as others who are free to roam the streets and maintain themselves separate and apart from an institutional environment, but he could do this and he can do it well enough to survive quite adequately.

The question that bothers me is that while I believe Mr. DiGilio outside the environment of being tested, outside of a stressful situation, on function at an efficient intellectual range, will the stresses of this case prevent him from so functioning?

I don't know what the answer to that question is, but I do not believe that this can be a self-elevating situation, what I would call a bootstrap operation, that the stresses of having to go to trial can so act upon one otherwise able to go to trial that his mentality is diminished and he is incompetent to go to trial.

If we had that kind of situation we probably wouldn't get very many people to trial in the first place.

Appendix B

In the second place, we would be in that situation where you have a man indicted by a grand jury, accused of serious crime, and he is not commitable and not triable, and therefore perpetually able to avoid answering the charges society has brought against him.

That, I think, is the root position of the defendant in this case. I suspect — and if I have to predict, I would find — that Dr. Taub is correct. Once Mr. DiGilio gets behind him more testing by doctors, more testing by psychiatrists, once he recognizes that this hearing is over, that he must go to trial, that his only opportunity to protect himself is to cooperate with counsel, and understand what is going on, that he will rise above that retarded intellectual level. And if he does, and I think he will, he will then be able to understand the nature of the proceedings against him, understand counsel and cooperate in his own defense.

I think Dr. Gagliardi admitted, when I described the nature of these charges to him, that Mr. DiGilio had the capacity to understand them.

I don't think that he can cooperate in his defense to the extent that a bank president, accused of bank fraud, who had an M.B.A. could. But that, after all, is not the test. The test is not whether this man can cooperate to the fullest intellectual extent of which he is capable.

The test is: Can he cooperate with counsel to a reasonable degree? And can he achieve a reasonable understanding of the nature of the charges against him?

I find, in short, that Mr. DiGilio can be both; that while he is mentally impaired because of his organic brain disease, that impairment is not so extensive that I should declare him incompetent to stand trial. And by the standard I have previously quoted I do find him, in fact, competent to go to trial in this case.

Mr. Robertson, do you want to prepare an order to that effect?

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
H. CURTIS MEANOR
Judge

311 United States Court House
Newark, N.J. 07101

June 24, 1975

RE: United States v. DiGilio, et al
Criminal No. 74-314

Michael A. Querques, Esq.
501 Central Avenue
Orange, New Jersey, 07050

William W. Robertson, Esq.
Deputy Chief, Special Prosecutions
United States Attorney's Office
970 Broad Street
Newark, New Jersey, 07101

Appendix B

Dear Messrs. Querques and Robertson:

I wish to add the following paragraph to the oral opinion of the court in the above matter.

Dr. Taub's testimony that Mr. DiGilio can function at a higher intellectual range when his mental capacity is not being tested and he has no motive to simulate is corroborated by the evidence of Dr. Sanford Lewis. Dr. Lewis recently examined Mr. DiGilio with reference to his medical as distinguished from his psychiatric problem. Dr. Lewis, a Board certified internist with a considerable psychiatric background, found no hint of mental incompetency or lack of ability to communicate during his examination. It must be noted that Mr. DiGilio has claimed, in addition to mental incompetency, physical inability to undergo the rigors of trial, although he has abandoned the latter issue and did not put that matter to a contest. Obviously, when undergoing a physical examination it is to Mr. DiGilio's advantage to communicate effectively with the physician and a motive to simulate the symptoms of organic brain disease would then be absent. In addition, when communicating for the purposes of a physical examination Mr. DiGilio knows that his mental status is not under scrutiny and, therefore, need not engage in ego protection and is thus able to function at an intellectual level higher than his test scores would indicate.

Very truly yours,

s/ H. Curtis Meanor
H. Curtis Meanor
U.S.D.J.

HCM:el
c.c. Clerk's office.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS, 538 FED. 972

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES of America

v.

John DiGILIO et al., Appellant in
No. 75-2218,

Appeal of Harry LUPO, in No. 75-2219

Appeal of Peter SZWANDRAK, in
No. 75-2220.

Nos. 75-2281-75-2220.

Argued April 8, 1976.

Decided June 7, 1976.

As Amended June 21, 1976.

As Amended Aug. 4, 1976.

Rehearing and Rehearing En Banc
Denied July 19, 1976.

Dissenting Opinion Aug. 10, 1976.

Defendants were convicted before the United States District Court for the District of New Jersey, H. Curtis Meanor, J., of

conspiracy to defraud United States and of misappropriation of government records consisting of photocopies of official files of Federal Bureau of Investigation, and they appealed. The Court of Appeals, Gibbons, Circuit Judge, held that unauthorized photocopies of office files of Federal Bureau of Investigation made by FBI office clerk-typist by use of government equipment and government supplies constituted "records" of Government within statute proscribing the conversion of "records" of the United States and supported convictions for violations of statute; that evidence was insufficient from which jury could find that any of several thefts that Government proved was of a record having a value in excess of $100 for purpose of imposition of felony sanction; that suggestion that there is a "parallel statements" exception to rule of Bruton was expressly disapproved; that error in admitting certain unredacted statements was harmless beyond reasonable doubt; that neither codefendants' confession was fruit of an illegal arrest upon theory that "forthwith" grand jury subpoenaes were used as a substitute for an arrest warrant; and that in proceeding on motion to determine defendant's incompetency to stand trial, no burden of proof rests on defendant.

Judgment in No. 75-2219 affirmed; judgment in No. 75-2220 vacated and case remanded for resentencing; judgment in No. 75-2218 vacated and case remanded with directions for determination of competency and resentencing.

Rosenn, Circuit Judge, dissented from denial of rehearing en banc and filed opinion in which Adams and Weis, Circuit Judges, joined.

* * *

Appendix C

Richard A. Green, Rowley & Scott, Katherine L. Boland, on the brief, Washington, D.C., Seymour Margulies, Brigadier & Margulies, Robert Margulies, on the brief, Jersey City, N.J., for John DiGilio.

Frederick P. Hafetz, Goldman & Hafetz, New York City, for Harry Lupo.

Thomas S. Higgins, Asst. Federal Public Defender, D.N.J., Newark, N.J., for Peter Szwandrak.

Jonathan L. Goldstein, U.S. Atty., James A. Plaisted, Asst. U.S. Atty., Newark, N.J., for appellee.

Before CLARK,* Associate Justice, and GIBBONS and HUNTER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge:

These are consolidated appeals from judgments of conviction and sentence. Appellants John DiGilio (No. 75-2218), Harry Lupo (No. 75-2219) and Peter Szwandrak (No. 75-2220) were indicted, with three other persons not parties to this appeal for violations of 18 U.S.C. §§371 and 641. The indictment charged that the defendants conspired to defraud the United States (Count I), and converted to their own use "records of the United States; that is, photocopies of official files of the Federal Bureau of Investigation, of a value in excess of $100.00" (Count II). Two of the defendants, George Kuczynski and Irene

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* Sitting by designation.

Klimansky (now Irene Klimansky Kuczynski), pleaded guilty to the conspiracy count of the indictment and were severed from the trial. The Kuczynskis testified for the government at the trial of the four remaining defendants. One of the defendants, John Grillo, was acquitted at trial on both counts.

A jury found DiGilio, Lupo and Szwandrak guilty on both counts. The jury, however, found Lupo guilty only of theft of property of a value under $100. He was sentenced, therefore, in accordance with the proviso in the third paragraph of § 641[1] on the substantive count, and in accordance with the second paragraph (misdemeanor) of § 371[2] on the conspiracy count.[3]

1. "Whoever [converts to his own use government records]

> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

18 U.S.C. § 641.

2. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

> If, however, the offense, the commission which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

18 U.S.C. § 371.

3. The district court sentenced Lupo to a prison term of six months and a fine of $1,000 on Count I. On Count II he received a suspended one year jail sentence, aand five years probation.

DiGilio and Szwandrak received felony sentences on both the conspiracy and substantive counts.[4] Each appellant contends that his conviction should be reversed because the conduct charged in the indictment and proved at trial was not a crime proscribed by § 641. Each defendant also urges that there were trial errors with respect to the court's charge and its rulings admitting and failing to suppress evidence, which warrant a new trial. Defendants DiGilio and Szwandrak contend that even if their judgments of conviction should be affirmed, they should be resentenced pursuant to the lower range of sanctions prescribed in the proviso to § 641. Finally, DiGilio argues that he should not have been tried at all because he was incompetent to stand trial. We conclude that defendants DiGilio and Szwandrak must be resentenced, but that prior to resentencing the district court must hold a hearing to determine (1) whether DiGilio was competent to stand trial throughout the proceedings in the district court and (2) whether he is competent to be resentenced.

I. THE FACTS

The evidence at trial tended to show that from the fall of 1971 through the spring of 1972 DiGilio, acting first through Lupo and Szwandrak and later through Grillo, procured the unauthorized copying of documents in the FBI files. The documents which were copied related to an investigation of alleged criminal activity by DiGilio. The unauthorized copies were made by Irene Klimansky, a clerk-typist in the Newark, New Jersey office of the FBI, during her working hours and with government paper and copying equipment. The original records

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4. DiGilio was sentenced to nine years' imprisonment on Count II and was fined $10,000. A five-year concurrent term of imprisonment was imposed on Count I. Szwandrak received concurrent six month custodial sentences on Counts I and II, and was placed on probation for four and one-half years.

were returned by Klimansky to the proper files. She delivered the copies of the documents to her then-fiance, George Kuczynski. Kuczynski delivered the copies from time to time to DiGilio's intermediaries, who paid him from $25 to $100 for each delivery. On one occasion Kuczynski received a $200 payment, but this was not related to the delivery of any specific group of documents, and was described as a Christmas bonus. There were multiple deliveries of copies from Klimansky to Kuczynski. Kuczynski broke down some of the deliveries from Klimansky into smaller components, in an effort to get more money from DiGilio. Thus there were more deliveries from Kuczynski to DiGilio's intermediaries than from Klimansky to Kuczynski. The evidence did not connect a payment in excess of $100 to any particular delivery. Nor was there evidence that DiGilio arranged with Kuczynski for the delivery in installments of a previously identified group of documents or records. During the apparent life of the conspiracy, however, over $1000 was funneled to Kuczynski through DiGilio's intermediaries.

Most of the above-recited facts were stipulated by the defendants. In addition, Kuczynski's testimony at trial identified Szwandrak as the initial intermediary from DiGilio, and tended to incriminate DiGilio, Grillo and Lupo as conspirators, and DiGilio as the source of payments and the ultimate recipient of the contraband copies. Kuczynski testified that he passed on documents both to Szwandrak and to Grillo. The remainder of the government's case consisted of statements made to various FBI agents by Lupo and Szwandrak, to which more particular reference will be made in Parts IV and V of this opinion.

II. THE § 641 VIOLATION.

The second count of the indictment charges that the defendants converted to their own use "records of the United

States; that is, photocopies of official files of the Federal Bureau of Investigation. . . ." The statute under which they were indicted provides:

> "Whoever . . . converts to his use or the use of another . . . any record, voucher, money, or thing of value of the United States . . . shall be fined . . . or imprisoned . . ."

* * *

ed that Lupo's statements were voluntary. We review the trial court's determination of voluntariness by the clearly erroneous standard. *Government of the Virgin Islands v. Gereau, supra,* 502 F.2d at 922. By that standard of review the conclusion of voluntariness must be affirmed. No purpose would be served by repeating here the factual analysis engaged in by the district court.

In summary, we reject all the grounds for suppression advanced by the appellants.

VI. DiGILIO'S COMPETENCE TO STAND TRIAL

On April 7, 1975, counsel for DiGilio moved on his behalf pursuant to 18 U.S.C. § 4244 for a determination of his competency to stand trial.[15] The district court directed DiGilio to report to the Carrier Clinic at Belle Mead, New Jersey on May 12, 1975, to be examined with regard to his competency to go to trial on June 10, 1975. DiGilio reported to the Clinic and

15. In another case in the district court for the District of New Jersey a similar motion was made on DiGilio's behalf and denied. That case resulted in an acquittal.

underwent psychiatric and psychological examination. On June 6, 1975 and for eight trial days in June the district court conducted a hearing on the motion.

Ultimately, the court concluded that DiGilio was competent to stand trial. At the hearing there was substantial evidence, which the district court apparently credited, tending to establish that DiGilio suffers from organic brain disorders of traumatic origin, and functions at a retarded level. The court nonetheless concluded that he was legally competent. That conclusion is reflected in findings of fact dictated from the bench at the conclusion of the hearing on June 19, 1975 and supplemented by a letter to counsel dated June 24. At the outset the court stated that the defendant in a § 4244 proceeding bears the burden of proving by a preponderance of the evidence his incompetency to stand trial. It then reviewed the medical evidence in some detail and concluded:

> "The test is: Can he cooperate with counsel to a reasonable degree? And can he achieve a reasonable understanding of the nature of the charges against him?
>
> I find, in short, that Mr. DiGilio can do both; that while he is mentally impaired because of his organic brain disease, that impairment is not so extensive that I should declare him incompetent to stand trial. And by the standard I have previously quoted I do find him, in fact, competent to go to trial in this case."

DiGilio's attorneys urge that the court erred in two significant respects. They first complain that in weighing the evidence the

court proceeded on the assumption that DiGilio had the burden of proof. As we pointed out above, the court explicitly announced that assumption. They next complain that the court, in evaluating the evidence of competency to stand trial, erroneously took into account DiGilio's committability in the event he were adjudicated incompetent. Certainly the court in its findings made reference to that factor.[16]

[23] There is surprisingly little case law dealing with the allocation of the burden of proof in a proceeding under § 4244[17] Perhaps this absence of discussion reflects the fact that a § 4244 motion may be made by the United States Attorney, by the court on its own motion, and "in behalf of the accused." In such a proceeding, no matter by whom it is brought, the critical issue is the capacity of the defendant to assume any burden in any adversarial judicial proceeding. Although § 4244 does not say so explicitly, due process requires that the trial court inquire sua sponte into the defendant's competence if there is reason to

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16. The court said:

> "In the second place, we would be in that situation where you have a man indicted by a grand jury, accused of [a] serious crime, and he is not committable and not triable, and therefore perpetually able to avoid answering the charges society has brought against him."

17. The government relies on *United States ex rel. Johnson v. Brierley*, 334 F.Supp. 661, 662 (E.D.Pa.1971), a state habeas corpus case, for the proposition that "[c]ompetency is presumed and the burden is on the petitioner to establish his competency." *See also Swisher v. United States*, 237 F.Supp. 921, 942 (W.D.Mo.1965), *aff'd*, 354 F.2d 472 (8th Cir. 1966). *But compare United States v. Testa*, 404 F.Supp. 1259, 1267-68 (E.D.Pa.1975), a § 4244 case in which the same district judge placed the burden of proving competency on the government. In *Testa* there had been a prior adjudication of incompetency.

doubt it. *See Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). It would make little sense to impose such a due process burden on the court but to place the burden of proof on the defendant. Nor, we assume, would the burden of proof rest with the defendant when the United States Attorney makes the motion. There is nothing on the face of the statute suggesting that the burden of proof should be different when the motion is made "in behalf of the accused."[18]

In the somewhat analogous context of a proceeding under 18 U.S.C. § 4245,[19] the District of Columbia Circuit discussed, but did not resolve, the issue of the burden of proof of incompetency to stand trial. *Fooks v. United States,* 100 U.S.App.D.C. 348, 246 F.2d 629 (1956) (per curiam); 100 U.S.App.D.C. 348, 246 F.2d 631 (1957) (statements of majority and minority on petition for rehearing in banc). In *Fooks* the defendant was in custody following three separate sentences. The federal custodians, on the basis of observation during post-trial confinement, concluded that there was probable cause to believe Fooks was incompetent at the time of his trial. Pursuant to § 4245, hearings were held in each of the sentencing courts and resulted in findings that Fooks was competent. On appeal the panel, consisting of Circuit Judges Miller, Bastian and Burger, in a per curiam opinion wrote:

> "Two of the District Judges specifically ruled that, even if the Government had the burden of

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18. *Compare* Ill.Ann.Stat. ch. 38, § 1005-2-1, which places the burden of proving competency upon the moving party, and upon the prosecution when the court is the moving party.

19. 18 U.S.C. § 4245 establishes procedures for raising and determining after trial issues of mental competency at the time of trial.

> establishing such competency beyond a reasonable doubt, as to which we now express no opinion, it had carried that burden; and it is fairly inferable that the third District Judge, who, by consent heard the testimony with one of the other judges, did likewise." 246 F.2d at 630-31.

On petition for rehearing in banc the court divided sharply over the effect to be given to the § 4245 certification from the Bureau of Prisons. Then Judge Burger for a majority of five wrote that a § 4245 certificate created a rebuttable presumption of incompetency, which fell out of the case when the government introduced some evidence of competency. Without deciding the issue that majority said that even if in that posture of the case the burden of proof was on the government, and included an obligation to establish competency beyond a reasonable doubt, the findings of the district judges that this burden had been met were not clearly erroneous. Judge Bazelon for the minority would have held that filing the § 4245 certificate was prima facie evidence of incompetency and that thereafter the government had the burden of proving competency, which in Fooks' case had not been met. It appears to have been common ground, then, that the government in a § 4245 proceeding had to meet some burden of proof. That conclusion is consistent with the provision in § 4245 that "the certificate of the Director of the Bureau of Prisons shall be prima facie evidence of the facts and conclusions certified therein."

We note that § 4245 relief is available only when "the issue of mental competency was not raised and determined before or during said trial." Moreover, § 4244 does not contain any language making a certificate "prima facie evidence of the facts and conclusions certified therein." But the obligation to hold a §

4244 hearing arises only if a psychiatrist's report indicates a present state of mental incompetency. Such a report would seem to serve the same purpose as the Certificate of the Director of the Bureau of Prisons in a § 4245 proceeding.

But we do not believe that it is reasonable to construe § 4244 as placing the burden on the defendant to prove incompetency as long as the burden shifts to the government in a § 4245 proceeding after trial. Such a construction might well encourage defense counsel to delay raising the issue of competency until after trial, gambling for an acquittal with the knowledge that the competency issue could be litigated later. We are mindful, as well, of the Court's admonition in *Pate v. Robinson, supra,* 383 U.S. at 384, 86 S.Ct. at 841 that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." It is equally contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his incompetency which might otherwise be within his grasp. As the Court said in *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960) (per curiam) and reiterated in *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the due process rule against trying an incompetent protects a defendant who cannot effectively consult with counsel and cannot comprehend the nature of the proceedings against him.

[24] Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder. At that point the triability of a defendant will depend on where

the burden of proof is placed. To put the question another way, what we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, *see Drope v. Missouri, supra,* 420 U.S. at 171-72, 95 S.Ct. 896, the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant.[20]

[25,26] DiGilio's counsel would have us go further, and hold that the government must prove competency, once it is in issue, beyond a reasonable doubt. The beyond-a-reasonable-doubt test is constitutionally mandated for all elements of a criminal offense. *Mullaney v. Wilbur,* 421 U.S. 684, 95S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). But competency to stand trial is not an element of the crimes for which DiGilio was indicted. *Compare Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed.499 (1895); *Government of the Virgin Islands v. Bellott,* 495 F.2d 1393 (3d Cir. 1974) (sanity at the time of the offense). Moreover, the government is not, on every subsidiary issue arising during the course of a criminal proceeding, required to satisfy the beyond-a-reasonable-doubt standard. The preponderance-of-the-evidence test has been utilized in determining the admissibility of evidence under the constitutional exclusionary rules. *See, e.g., Lego v. Twomey,* 404

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20. The district court can, of course, allocate the burden of going forward with the evidence bearing on competency in any manner which will provide for the expeditious development of the facts relevant to its § 4244 determination.

U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (plurality opinion) (voluntariness of a confession); *United States v. Matlock,* 415 U.S. 164, 178n. 14, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974) (fourth amendment suppression). We do not believe that a more rigorous evidentiary standard is warranted here, and hold that a defendant's competency to stand need be established by a preponderance of the evidence only.

[27] Since the district court, in weighing the evidence on what was obviously a close and troublesome issue, explicitly referred to the defendant's burden of proof, and since that placement of the burden may have been decisive in resolving the ultimate issue, we cannot affirm its finding that DiGilio was competent to go to trial. The government would have us hold that because DiGilio's attorney made no simultaneous objection to the court's statement with respect to burden of proof, we should disregard the error. In view of the court's independent due process obligation on the competency issue, *Pate v. Robinson, supra,* there is not in our view room for the mechanical operation of the simultaneous objection rule.

[28] There remains the question whether the district court must hold a new hearing, and if DiGilio is found competent, conduct a new trial. Here the hearing was extensive and is not so remote in time as to present insurmountable problems of recollection. While nunc pro tunc determinations of mental competency are not favored, *Drope v. Missouri, supra,* 420 U.S. at 183, 95 S.Ct. 896; *United States v. Pogany,* 465 F.2d 72, 79 (3d Cir. 1972), we have in a state habeas corpus case recently recognized the possibility that a nunc pro tunc determination may be constitutionally permissible. *See United States ex rel. McGough v. Hewitt,* 528 F.2d 339, 343-44 (3d Cir. 1975). The district court is in the best position to determine whether it can,

either on the present record or with supplementary testimony, make a retrospective determination of DiGilio's competency throughout his trial. If the court concludes that this can be done, and concludes after applying the proper burden of proof that DiGilio was competent, then no new trial will be required.

[29] Since DiGilio's case is being remanded for further proceedings, it is appropriate to note that if the district court intended by its reference to DiGilio's noncommittability to suggest that this factor is relevant to the competency inquiry, we do not agree that it is. Congress has dealt with the problem of committability, explicitly if not satisfactorily, in 18 U.S.C. §§ 4246, 4247. The statute contemplates that in some cases a defendant may be incompetent to stand trial and also releasable. It is not at all clear from the context in which the reference to non-committability was made[21] that the district judge intended anything more than an observation about the statute. But if the fact that DiGilio might be released without trial did weigh in the determination of his competency to stand trial, on remand that factor should be disregarded.

VII. CONCLUSION

The judgment of sentence of the district court in the appeal of Harry Lupo (No. 75-2219) will be affirmed. The judgment of sentence in the appeal of Peter Szwandrak (No. 75-2220) will be vacated and the case remanded to the district court for resentencing within the lower range of sentences permitted by this opinion. The judgment of sentence in the appeal of DiGilio (No. 75-2218) will be vacated and the case remanded to the district court (1) for a determination (a) whether the court can

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21. *See* note 15 *supra.*

now decide DiGilio's competency at the time of his trial and sentence, and if so, (b) whether he was competent at those times. If the court concludes that DiGilio was competent at the time of his trial and remains so, he should be resentenced within the lower range of sentences permitted by this opinion. If the court finds that it cannot retroactively determine DiGilio's competency, he must be granted a new competency hearing and if found to be competent a new trial. In such a new trial the district court should decide in the first instance whether, in view of the government's failure of proof on the value of the stolen documents at this trial, double jeopardy considerations will limit the range of sentences to those which we today hold permissible.[22]

SUR PETITION FOR REHEARING

Before CLARK, Associate Justice, SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

The petition for rehearing filed by appellee in the above entitled case (75-2218 and 75-2220) having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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22. See Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1948); *United States v. Koonce,* 485 F.2d 374, 381-82 (8th Cir. 1973); *United States v. Stephenson,* 474 F.2d 1353, 1355 (5th Cir. 1973); *United States v. Howard,* 432 F.2d 1188, 1191 (9th Cir. 1970). *See also North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

Appendix C

ROSENN, Circuit Judge, would grant rehearing.

OPINION SUR DENIAL OF PETITION FOR REHEARING

ROSENN, Circuit Judge.

I believe this case merits consideration by the court en banc. The issues on which the panel vacates the sentence of the defendants DiGilio and Szwandrak have wide reaching ramifications and the Government asserts that they were neither briefed nor argued by the parties in this court.

Count II of the indictment essentially charges that the defendants "commencing on or about November 1, 1971, to on or about June 30, 1972," in furtherance of the conspiracy charged in Count I, stole, purloined, and converted to their own use photocopies of official files of the Federal Bureau of Investigation of a value in excess of $100. This language, especially since it incorporates the conspiracy allegations of Count I charging a scheme to surreptitiously remove photocopies of official files, plainly charges a single plan to steal photocopies of official FBI files over a period of time.

The Government avers that the district court charged the jury that if the installment deliveries of documents from DiGilio's file were made pursuant to a single criminal plan, the values of all such installments could be aggregated for the purpose of determining whether records valued at $100 had been stolen within the meaning of 18 U.S.C. § 641. By its guilty verdict, the jury indicated its acceptance of the single plan theory.

The panel opinion, however, rejects the single plan finding. It rests on the premise that since the thefts occurred in

installments, each installment must be treated as a separate offense, and thus "the more-than-$100 figure cannot be attained simply by aggregating the values of all the documents taken." (at p. 980.) The general rule appears to be to the contrary. *People v. Cox,* 286 N.Y. 137, 36 N.E.2d 84, 86 (1941); *Hurlburt v. Falvey,* 298 N.E.2d 897 (Mass.App.1973); Annot., 53 A.L.R.3d 398 (1973). "As long as the larceny is held to be pursuant to a single intent, and one complete illegal scheme, it matters not the length of the period over which the takings continued." *People v. Cox, supra,* 36 N.E.2d at 86. Where the Government charges and proves a series of acts under a sustained plan and intent to commit a single larceny, aggregation of values for the various takings is permissible. *Hurlburt v. Falvey, supra,* 298 N.E.2d at 897. This is the rule in twenty-eight of the thirty state jurisdictions surveyed in 53 A.L.R.3d 398 (1973).

The payments of DiGilio of over $1,000, regardless of whether they included services for an intermediary in arranging the theft, was evidence from which the jury could infer a value of the records to DiGilio of more than $100. This evidence afforded a concrete base for the jury's verdict; it required no speculation by the jury as to the aggregate value.

Accordingly, I dissent from the order denying rehearing en banc. Circuit Judge WEIS joins in this dissent. Circuit Judge ADAMS has authorized me to state that he, too, believes the matter presented here is of sufficient importance to warrant consideration by the Court en banc.

APPENDIX D — JUDGMENT DATED JUNE 7, 1976

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-2218/75-2220

UNITED STATES OF AMERICA

vs.

JOHN DI GILIO, JOHN GRILLO, HARRY LUPO,
PETER SZWARNDRAK, GEORGE KUCZYNSKI,
IRENE (KLIMANSKY) KUCZYNSKI
JOHN DI GILIO, Appellant in No. 75-2218
HARRY LUPO, Appellant in No. 75-2219
PETER SZWANDRAK, Appellant in No. 75-2220

(D.C. Criminal No. 74-314)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: CLARK*, Associate Justice, GIBBONS, and HUNTER, Circuit Judges

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed September 19, 1975, be, and the same are hereby affirmed as to the conviction of Harry Lupo in the appeal

docketed at No. 75-2219; and it is further ordered that the judgment of sentence of Peter Szwandrak at No. 75-2220 is vacated and remanded to the district court for resentencing within the lower range of sentences permitted by the opinion of this Court; and it is further ordered that the judgment of sentence in the appeal of John Di Gilio at No. 75-2218 is vacated and the cause is remanded to the district court for further proceedings consistent with the opinion of this Court.

ATTEST:

s/ Thomas F. Quinn
Clerk

June 7, 1976

* Sitting by designation

Certified as a true copy and issued in lieu of a formal mandate as to No. 75-2219 on June 29, 1976.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX E — OPINION OF H. CURTIS MEANOR, D.J., DATED NOVEMBER 2, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-314

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN DI GILIO,

Defendant.

Appearances:

Jonathan L. Goldstein, Esq.
United States Attorney
Attorney for Plaintiff
BY: William F. Maderer, Esq.
Assistant United States Attorney

Michael A. Querques, Esq.
Attorney for Defendant
and
Brigadier & Margulies, Esqs.
(Of Counsel)
BY: Seymour Margulies, Esq.

MEANOR, District Judge.

Appendix E

In July 1975 the defendant, John DiGilio, was convicted of violation of both 18 U.S.C. § 371 and § 641. The indictment charged that DiGilio and others conspired to defraud the United States and converted to their own use FBI records pertaining to an FBI investigation of DiGilio. He was sentenced to nine years' imprisonment on the § 641 count and fined $10,000. He was sentenced to a concurrent five year term on the § 371 count. On appeal, *United States v. DiGilio,* 538 F.2d 972 (3d Cir. 1976), it was held, among othher things, that the government's proofs failed to establish value of the converted property in excess of $100 and, therefore, DiGilio could not be guilty of more than two misdemeanors. But for the necessity of a fresh competency hearing regarding DiGilio, required by the remand, the simple disposition of this case following appeal would have been to resentence DiGilio as a misdemeanant, as was done with his codefendant, Peter Swandrak.

Prior to the 1975 trial, DiGilio placed in issue his competency to stand trial. An eight day hearing on this issue was conducted in June 1975 with the result that DiGilio was found to be competent. At the competency hearing, the burden of proof was placed upon DiGilio to prove his incompetency to stand trial by a preponderance of the evidence. The Court of Appeals held that this was error and that in a proceeding to determine such competency pursuant to 18 U.S.C. § 4244 it is the obligation of the government to prove competency by the preponderance standard. See 538 F.2d 988. The court also held, however, that a § 4244 proceeding need not be held unless "a psychiatrist's report indicates a present state of mental incompetency." 538 F.2d at 987. There is no question that DiGilio properly triggered the competency hearing. Resolution of DiGilio's 1975 competency to stand trial pursuant to the remand has been delayed considerably by plea negotiations which have aborted.

Appendix E

As I read the opinion of the Court of Appeals, the following is required with respect to the competency issue:

1. This court is to determine whether it can retroactively determine DiGilio's 1975 competency on the basis of the record adduced at the competency hearing. If so, that determination shall be made. If not, a fresh competency hearing must be held and thereafter a new trial if DiGilio is found presently to be competent.

2. If DiGilio is found on the basis of the existing record to have been incompetent at the time of his trial in 1975, a new competency hearing and, if he is found to be competent, a new trial will have to be held.

3. If DiGilio is now found to have been competent at the time of his 1975 trial, he is to be re-sentenced as a misdemeanant on his two 1975 convictions, but first a de novo competency hearing will have to be held to determine his present competency to be sentenced. Since DiGilio is awaiting trial under another indictment in this court, his competency to undergo present sentencing on his 1975 convictions and his competency to be tried on the pending indictment may be combined in one proceeding.[1]

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1. There is some ambiguity in the opinion of the Court of Appeals. It said:

> The judgment of sentence in the appeal of DiGilio (No. 75-2218) will be vacated and the case remanded to the district court (1) for a determination (a) whether the court can now decide DiGilio's competency at the time of his trial and sentence, and if so, (b) whether he was competent at those times. If the court concludes that DiGilio was

(Cont'd)

Appendix E

I

I have no doubt that DiGilio's competency at the time of trial can be determined upon the existing record in light of the re-allocation of the burden of proof required by the opinion of the Court of Appeals. As that court noted, while nunc pro tunc determinations of competency are not favored, they are permitted. The task of determining whether the existing record will permit such a determination was delegated to this court. 538 F.2d at 989.

The underlying rationale of judicial inhospitability to retroactive decisions concerning competency lies in the difficulty of adducing present evidence concerning prior competency *Dusky v. United States,* 362 U.S. 402 (1960); *United States v. Pogany,* 465 F.2d 72 (3d Cir. 1972); *Drope v. Missouri,* 420 U.S.

(Cont'd)

competent at the time of his trial and remains so, he should be resentenced within the lower range of sentences permitted by this opinion.

I have no way of determining DiGilio's present competency without a fresh hearing. There, again, is no question but that DiGilio properly has put in issue his present competency. The imposition of sentence following the 1975 trial took place about two months following the conclusion of the trial. Since he must be re-sentenced, I am of the opinion that his competency at the time of the sentence in September 1975 is irrelevant. The question is rather one of his present competency to undergo re-sentence on his 1975 convictions, as modified from felony to misdemeanor convictions by the Court of Appeals. I, therefore, construe the opinion of the Court of Appeals to require, if possible, a determination of his 1975 competency at trial and if he was then competent of his present competency to be sentenced.

162, 183 (1975); *Pate v. Robinson,* 383 U.S. 375, 387 (1966). In these cases, either no competency hearing was held or only severely limited evidence was presented on the issue.

By contrast, in this case an unusually complete record is available. The eight day hearing produced a record of over 1300 pages of transcript. Testimony was taken from three psychiatrists, one clinical psychologist and one internist, all of whom had recently examined DiGilio, and from three lawyers and three lay witnesses. In addition, multitudinous exhibits consisting of medical, psychological and hospital reports were admitted. These all dealt with the then present condition of DiGilio. I believe that it is safe to say that rarely has such a complete record been compiled with respect to a defendant's competency. I, therefore, have no hesitancy in concluding that the competency of DiGilio can be determined on the basis of the existing record. As the Court of Appeals noted in this case, 538 F.2d at 989, retroactive or nunc pro tunc determinations of competency are permitted under appropriate circumstances. See *United States ex rel. McGough v. Hewitt,* 528 F.2d 339, 343 (3d Cir. 1975) and *Conner v. Wingo,* 429 F.2d 630 (6th Cir. 1970).

II

The test of mental competency to stand trial was set forth in *Dusky v. United States, supra,* as follows:

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree

> of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

362 U.S. at 402.

The limited significance of placing the burden of proof upon the government was noted in the opinion of the Court of Appeals:

> Allocation of the burden of proof will be significant, in theory at least, only in the rare case when, assuming the evidence is weighed by the preponderance of evidence standard, the conflicting evidence is in equipoise in the mind of the fact finder. At that point the triability of a defendant will depend on where the burden of proof is placed. To put the question another way, what we are determining is a rule of law, of due process dimensions, that a defendant, about whom the evidence of competency to stand trial is in equipoise, should or should not be tried. If, as the Court has made clear, the concept of competency to stand trial is grounded in notions of fundamental fairness in the operation of the judicial process, see *Drope v. Missouri, supra,* 420 U.S. at 171-72, 95 S. Ct. 896, the question can only be answered in the negative. Evidence showing competency must be more persuasive than that showing incompetency. Of necessity, then, there is no room for a rule of law placing any burden of proof on the defendant.

538 F.2d at 988.

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Pursuant to the above, it is now this court's obligation to scrutinize the record and the exhibits of the 1975 competency hearing and to determine whether the evidence preponderates in favor of a finding of competency at that time on the part of DiGilio. If it does, then the misdemeanor convictions will stand and, subject to a hearing on his present competency as a prerequisite to the imposition of sentence, DiGilio will be re-sentenced. If the evidence does not so preponderate, the convictions must be vacated and DiGilio will be entitled to a new trial.

III

As the conclusion of the competency hearing on June 19, 1975, oral findings and conclusions of the court were dictated into the record.[2] After a perusal of all of the testimony adduced in June 1975, except that of Nathan Lemler, and of the exhibits introduced at that competency hearing, I find that the evidence preponderates in favor of the conclusion that DiGilio was competent at that time and was competent throughout his trial in July 1975. The reasons for this determination were set forth in detail at the conclusion of the hearing on June 19, 1975 and are

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2. At the hearing there was differing testimony as to whether DiGilio was committable. Dr. Spitzer of the Carrier Clinic opined that he was while Dr. Gagliardi believed that he was not. Dr. Gagliardi's view led to my comment quoted by the Court of Appeals, 538 F.2d at 986, n. 16. The Court of Appeals correctly discerned the meaning of this remark—it was an observation not a conclusion of law. 538 F.2d at 989. Committability and competency to stand trial present different issues and different standards. See *Coll v. Hyland*, 411 F.Supp. 905, 909 (D.N.J. 1976) and cases there cited for the standard of commitment. Under the differing standards one might be committable and triable and also not committable and not triable. There is, thus, no relationship between incompetency to stand trial and incompetency as a prerequisite to commitment.

in the transcript. There is no point in reciting them again here. For the reasons stated by me on June 19, 1975 as supplemented by my letter to counsel dated June 24, 1975, I find that the government has established by a preponderance of the evidence that DiGilio was competent throughout his trial in July 1975.

One newly raised issue must be resolved. During the trial on July 28, 1975 the court addressed DiGilio concerning his right to testify in his own behalf. The colloquy went on for about six pages of transcript. For the most part, DiGilio's statements, though evasive, were intelligible and responsive. DiGilio did, however, claim that the jurors were being changed. Of course, no such thing happened. Citing *Amador Beltran v. United States,* 302 F.2d 48 (1st Cir. 1962); *United States v. Davis,* 365 F.2d 251 (6th Cir. 1966) and *Drope v. Missouri, supra,* it is now alleged that this event should have triggered a mid-trial second competency hearing and the court's sua sponte failure to conduct such a hearing was error.[3] It is also suggested that in the absence of a record as to DiGilio's competency at that time, his mental status during trial cannot now be determined and, hence, his convictions should be vacated and, subject to a fresh determination of competency, a new trial should be held.

I must point out that the Court of Appeals expressly has left to this court determination of the question whether DiGilio's competency can be decided upon the present record. Although it does not appear from the opinion of the Court of Appeals that DiGilio's remarks during trial were specifically called to the attention of that Court, they were in the record.

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3. DiGilio's two experienced trial attorneys who were both present at the time of this colloquy did not request a competency hearing at that time, nor did they suggest that DiGilio's mental state had changed during the trial.

Appendix E

There is, however, a most compelling reason why DiGilio's claim during trial that the jurors were being changed does not affect either of my determinations: (1) that his competency can be judged on the basis of the 1975 record, and (2) that he was competent throughout his trial. DiGilio's statements during trial, I find, stemmed from his effort to simulate mental incompetency in order to avoid trial.

It must be remembered that DiGilio has organic brain disease to some extent. He functions at a low normal range of intelligence. He tests lower than his actual mental capacity. The reasons for this are complicated as set forth in my findings on June 19, 1975. To state his situation briefly, DiGilio refuses to extend his best efforts on testing, fearful that if he did so he would do poorly and would then have to recognize his limited intellectual capacity. Doing poorly on tests after not trying to do well gives him ego protection against the stigma of the results. What he persists in doing is to use his organic brain syndrome, concerning which there is really no objective evidence, and his poor test results as a basis for simulating mental incompetency to avoid trial.

DiGilio's mental state was examined exhaustively in June 1975. Nowhere in his history or in the record is there any credible evidence that he ever was hallucinatory. To believe that the jurors were being changed during the trial is a hallucination. That DiGilio suffered from hallucinations previously never has been suggested. The evidence is clear to me that DiGilio is not hallucinatory, and never has been. He may be paranoid about certain subjects, including the FBI, but paranoia and hallucination are distinct mental phenomena. It is incredible that DiGilio should suddenly have become truly hallucinatory for the first time during trial. It is particularly telling that this

hallucination occurred late in the trial in the face of a finding that DiGilio was simulating mental illness to avoid trial. I, therefore, find that DiGilio was not in fact hallucinatory during trial but that his statement concerning the changing of jurors was another attempt on his part to avoid trial by simulation of mental illness. It is also noteworthy that in connection with this re-determination of DiGilio's competency, no proof was adduced or offered to show that hallucination was psychiatrically consistent with DiGilio's organic brain disease.

For the reasons stated, I find that the evidence in the record and exhibits before me preponderates in favor of the conclusion that DiGilio was mentally competent throughout his 1975 trial. At that time he had the capacity to consult with counsel with a reasonable degree of rational understanding and he had a rational and factual understanding of the nature of the charges against him and the proceeding he was undergoing.

The government should submit an order in conformity with this opinion, with consent as to form, if possible, within 10 days. Counsel immediately should prepare for a hearing concerning DiGilio's present competency to be sentenced and to undergo trial of the remaining untried indictment. I will schedule that hearing for late December or early January and if DiGilio is found to be competent, sentencing on the present indictment and trial of the pending indictment will follow immediately.

DATED: November 2, 1977.

APPENDIX F — ORDER PURSUANT TO OPINION OF NOVEMBER 2, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal Number 74-314

UNITED STATES OF AMERICA

vs.

JOHN DI GILIO,

Defendant

This matter having come before the Court on remand from the Third Circuit Court of Appeals for a determination of (1) whether the court can retroactively determine DiGilio's 1975 competency on the basis of the record adduced at the competency hearing conducted in June 1975, and (2) if the Court can make that determination, whether the Government proved by a preponderance of the evidence that DiGilio was in fact competent at the time of and throughout the trial in July 1975, and this Court having reviewed the record of the 1975 competency hearing and trial and having reviewed legal memoranda from and heard oral argument by Seymour Margulies, Esquire, attorney for the defendant John DiGilio and the United States (William F. Maderer, Assistant United States Attorney appearing), and for good cause shown;

IT IS on this 11th day of January, 1978,

ORDERED THAT DiGilio's competency at the time of his July 1975 trial can be made on the basis of the existing record;

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AND IT IS FURTHER ORDERED THAT based on a review of the existing record with the Government carrying the burden of proof by a preponderance of the evidence, DiGilio was competent at the time of and throughout the trial in July 1975.

/s/ H. Curtis Meanor
H. CURTIS MEANOR
United States District Judge

Dated:

APPENDIX G — OPINION OF H. CURTIS MEANOR DATED OCTOBER 10, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-314

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN DI GILIO,

Defendant.

Appearances:

Robert J. Del Tufo, Esq.
United States Attorney
BY: William F. Maderer, Esq.
Mark J. Malone, Esq.
Assistant United States Attorneys

Michael A. Querques, Esq.
and
Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan
BY: Roger A. Lowenstein, Esq.
Attorneys for Defendant.

MEANOR, District Judge.

After a jury trial in July 1975, John Di Gilio was found guilty of violating 18 U.S.C. §§371 and 641. After sentence, the

defendant appealed. In its opinion in *United States v. Di Gilio,* 538 F.2d 972 (3d Cir. 1976),[1] the Court of Appeals for the Third Circuit held, *inter alia,* that Di Gilio could not be guilty of more than two misdemeanors. Such a holding required Di Gilio to be resentenced. Prior to the 1975 trial, Di Gilio placed in issue his competency to stand trial. He was found to be competent by this court after an eight-day hearing. The Court of Appeals held, however, that the burden of proof at that pre-trial competency hearing was incorrectly placed upon the defendant. The appeals court thus required that this court make a determination whether it could retroactively determine Di Gilio's 1975 competency on the basis of the record adduced at the pre-trial hearing. If the court could make such a retroactive determination, it was to do so. If that determination was that Di Gilio was competent to stand trial in 1975, he was to be resentenced as a misdemeanant on the two 1975 convictions, but first a *de novo* competency hearing would have to be held to determine his present competency to be sentenced.

In an unreported opinion filed November 2, 1977, this court found that it could make a retroactive determination of Di Gilio's competency to stand trial. The court held:

> I find that the evidence in the record and exhibits before me preponderates in favor of the conclusion that Di Gilio was mentally competent throughout his 1975 trial. At that time he had the capacity to consult with counsel with a reasonable degree of rational understanding and he had a rational and factual understanding of

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1. This opinion should be read prior to the instant opinion to fully understand the factual underpinnings of what this court decides herein.

the nature of the charges against him and the proceeding he was undergoing.

United States v. Di Gilio, Cr. No. 74-314 (D.N.J. Nov. 2, 1977), Slip. Op. at 8. The reasons for the finding of competency had been set forth in detail in the transcript of June 19, 1975, the concluding date of the hearing. Review of that transcript makes it clear that Di Gilio grounded his claim of incompetency on the existence of organic brain disease.

After the opinion of November 2, 1977, a new competency hearing was commenced to determine the defendant's present ability to be resentenced. Due to the press of other business, an intervening and unsuccessful mandamus proceeding resulting from the ruling of November 2, 1977 and negotiations between Di Gilio and the Government, the hearing progressed slowly during the months of April, May, November and December of 1978 as well as April 1979. The record consists of 19 volumes of testimony and over 3000 pages of transcript detailing the perceptions of lay witnesses as well as the views of experts in the fields of psychology, psychiatry, neurology and neuropsychology. Also in the record are several audio recordings and one video tape recording, as well as transcripts of same, which intercept conversations between Di Gilio and Government undercover agents during a period between March and August 1977. Both the defendant and the Government have presented the court with extensive findings of fact and legal argument to aid in a correct determination of the competency issue. After careful consideration of these materials as well as an exhaustive review of all the testimony and rehearing and reviewing the tape

recordings, I conclude that John Di Gilio is presently competent to be resentenced on the two misdemeanor charges.[2]

The test of mental competency to stand trial, as set forth by the Supreme Court in *Dusky v. United States,* 362 U.S. 402 (1960), is equally applicable to any significant stage in a criminal proceeding. In *Dusky,* the Court held:

> We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be

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2. There was another indictment pending in this district against Di Gilio (and four codefendants), Cr. No. 74-313. That case had been stayed pending determination of Di Gilio's competency to be resentenced on the instant charges, since a determination of incompetency here would certainly bind this court with respect to Di Gilio's competency to stand trial in Cr. No. 74-313. *See Dusky v. United States,* 362 U.S. 402 (1960). The record before me contains considerable testimony as to Di Gilio's competency to stand trial in Cr. No. 74-313 as well as his competency to be resentenced here. This is so because the hearing served the dual purpose of creating a record that could be used to decide the competency issue in both cases.

On June 26, 1979, I received a letter dated June 25, 1979 from William F. Maderer, Chief of the Special Prosecutions section of the United States Attorney's Office which declared that Office's position as deciding not to prosecute Di Gilio in Cr. No. 74-313 due to the unavailability of the key Government witness in that case. Thus, testimony in the record relevant to Di Gilio's present competency to stand trial as well as legal argument on that issue are collateral to what is determined here — the narrow question of whether Di Gilio is presently competent to withstand the rigors of being resentenced in Cr. No. 74-314. Because Cr. No. 74-313 is now moot as to Di Gilio, this court makes no determination and takes no position as to his present competency to stand trial. On September 28, 1979 Cr. No. 74-313 was dismissed in its entirety.

> whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

362 U.S. at 402.

The sentencing procedure is governed by Rule 32 of the Federal Rules of Criminal Procedure. Rule 32(a)(1) states, in pertinent part:

> Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 32(c)(3)(A) states, in pertinent part:

> Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation . . . ; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

These Rules presuppose a defendant who is able to consult with his attorney and who has a reasonable degree of rational

understanding of the proceedings of which he is a part. It is clear that the *Dusky* test is applicable to a determination of competency to be sentenced. Moreover, the burden of proof is on the Government to show by a preponderance of the evidence that Di Gilio is presently competent to be resentenced. *See United States v. Di Gilio, supra,* 588 F.2d at 988.[3]

In deciding that Di Gilio is competent to be resentenced, I find that the determinative testimony comes essentially from those witnesses who could testify knowledgeably about the claimed root cause of the defendant's problems — his organic brain disease. The neurological findings and testimony of Dr. Samuel Rosner, called as the defendant's expert, and Dr. Harold M. Somberg, called as the court's expert, are, therefore, most critical to my conclusions. Because Di Gilio's claim of incompetency is grounded in the existence of some organic brain disease, the perceptions and conclusions of those witnesses who performed psychological testing and psychiatric evaluation and treatment, based upon an awareness of the diagnosed organic difficulty, must be considered and weighed in light of the conflicting conclusions drawn by the expert neurosurgeons. In other words, if Di Gilio's organic problems are as diagnosed by Dr. Rosner, and his condition has deteriorated from the way it existed at the time of trial, the findings of the defendant's psychiatric experts are more meaningful than if Di Gilio's organic problems are as diagnosed by Dr. Somberg.

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3. The defendant argues that the "preponderance of the evidence" standard set forth by the Court of Appeals is incorrect, *see* Defendant's Brief on Competency Hearing at 81-85, and urges instead that this court apply the "beyond a reasonable doubt" standard or, at least, the "clear and convincing" standard. This I will not do. I choose to follow, as I must, the language and mandate of the Court of Appeals for the Third Circuit.

Appendix G

Di Gilio became a patient of Dr. Rosner in 1974. After an examination at that time, Dr. Rosner concluded that: "This patient is suffering from injury to the base of his brain and is borderline mentally defective. It is likely that this patient is suffering from epilepsy . . . (Tr. 1695). Dr. Rosner continued to see Di Gilio through 1977 and his neurological findings were always consistent. At some point during this period, Dr. Rosner was able to get some special views of Di Gilio's skull and concluded that there existed a type of blood vessel abnormality called "angioma." (Tr. 1703). It is the angioma which is the cause of Di Gilio's grand mal epilepsy and a combination of the angioma and multitudinous petechial hemorrhages causes by repeated blows to the head during his prize fighting career, which are the cause of his psychomotor epilepsy. (Tr. 1706-08).

The existence of an angioma is critical to a determination of Di Gilio's competency. This is so because Dr. Rosner theorizes that when these aberrant blood vessels become engorged with blood just prior to or at the onset of an epileptic attack or episode of stress, they become distended and will cause pressure on the brain at the site where the angioma is located. (Tr. 1766-67). Dr. Rosner further opined that when the engorgement of these vessels ceases, Di Gilio returns to normalcy. (Tr. 1771). Dr. Rosner testified that psychological stress in a patient like Di Gilio can cause a psychomotor [epileptic] attack and he could then go on to a grand mal attack. (Tr. 1714). Stress affects Di Gilio with an excessive increase in his heart rate and blood pressure (Tr. 1717) with concomitant effect on the organic lesion. Dr. Rosner testified that he has treated Di Gilio with medication basically aimed at reducing stress because his stress point is low due to brain damage. (Tr. 1718). Although conceding that he is not a psychiatrist, Dr. Rosner testified that he felt Di Gilio's condition had deteriorated since 1974,

manifesting in incidences of paranoia. (Tr. 1721-22). When asked for an opinion of Di Gilio's present ability to confer and consult with his attorney in a reasonable manner, to understand the nature of the court proceedings and to be able to fairly present himself before the court, Dr. Rosner replied:

> A. I don't think that he could do that.
>
> Q. Why can't he do it, sir?
>
> A. Because there may be periods of time where he has insight, and that's the key word, insight, into what's happening and understand the significance of everything that's asked of him; but as I said, the changes may be from a person of insight to one of paranoia, may be so gradual that the recognition that he no longer understands and no longer could participate to his benefit in his defense, that is something that is the danger point with him.
>
> He may be — he may be understanding and may be helpful at a particular and, yet, within minutes do something that's completely irrational.

(Tr. 1725).

While recognizing that Dr. Rosner is a neurosurgeon, not a psychiatrist, the court inquired as to whether Dr. Rosner found any functional overlay. The witness responded affirmatively and stated that the cause of this functional overlay was the angioma, petechial hemorrhage or a combination of both. (Tr. 1756-57).

Appendix G

Dr. Rosner testified that there are times when Di Gilio has insight and understands his situation, and when he acts with rationality. (Tr. 1853). Under questioning by the court, Dr. Rosner testified that these periods of rationality were periods when the angioma was not engorged. (Tr. 1854). The testimony continued:

> THE COURT: The brain damage alone from the particular hemorrhages, as I understand your testimony, will not render him incompetent. It's there but it's not —
>
> THE WITNESS: It's an aggravating —
>
> THE COURT: Alone it wouldn't render him incompetent?
>
> THE WITNESS: I would say not completely.
>
> THE COURT: Okay, but it's an aggravating factor when coupled with engorgement of angioma?
>
> THE WITNESS: Yes, I think that's a fair evaluation.
>
> THE COURT: And without the angioma, for our purposes, the ability to consult rationally with counsel, I take it, would be competent although impaired.
>
> THE WITNESS: Yes, I think he could be sensible. He may not have complete insight as to

> the significance of what he's saying or what counselor is saying, but he would have some understanding.

(Tr. 1855-56).

It is clear to me that Di Gilio's claim of incompetency rests entirely on the existence of the angioma. From the angioma flows all of the claimed functional overlay which allegedly so inhibits Di Gilio's ability to function in a rational manner as to preclude him from understanding and participating in the sentencing procedure in a reasonable way. Dr. Nathan Kritzberg, a Board certified psychoanalyst and Di Gilio's psychiatrist since 1969, testified that Di Gilio's problem is essentially organic brain disease and that his mental deficit is not functional, but organic, with the functional disorders superimposed on the organic condition. (Tr. 1911). When asked by the court if the elimination of the organic condition would cause the functional overlay to disappear, Dr. Kritzberg replied: "It certainly would. I feel that it would be on its way to disappearing." (Tr. 1912).

Although he testified as a defense psychiatrist, Dr. Kritzberg, a Diplomate of the American Board of Psychiatry and Neurology, also testified as to clinical evidence indicating a focal lesion in the left temporal parietal area of Di Gilio's brain, made manifest by the onset of jacksonian seizures in the right upper extremity. Dr. Rosner's angioma is alleged to exist in the right parietal area. As to this inconsistency in diagnosis, Dr. Kritzberg speculated that he and Dr. Rosner might be talking about two different organic lesions. (Tr. 1899-1901).

Dr. Harold M. Somberg, a noted neurosurgeon, was called as the court's expert. Dr. Somberg is associate clinical professor

of neurosurgery at the New Jersey College of Medicine and Chief of Neurosurgery at Newark Beth Israel Hospital, St. Michael's Hospital, the Hospital for Crippled Children, Irvington General Hospital and Clara Maas Hospital, and is on the neurosurgical service at St. Barnabas Hospital. He has full neurosurgical privileges at all of the above facilities. (Tr. 2373).[4]

Dr. Somberg examined Di Gilio on December 20, 1977 and on November 17, 1978. All of Di Gilio's prior x-rays and reports of other physicians were made available for Dr. Somberg to be used as a basis for his conclusions.[5] On the basis of his

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4. Dr. Somberg was specifically asked on both direct and cross-examination to comment on the qualifications of Dr. Rosner, the defense neurosurgeon (Tr. 2374-78; 2740-50), and testified that several of the Board certifications set forth in Dr. Rosner's resume were, in Dr. Somberg's experience, for nonexistent organizations. Dr. Somberg specifically looked up Dr. Rosner in the Directory of Medical Specialists (1972-73) and in the Diplomates of the American Board of Neurological Surgery and found no listing in either source. (Tr. 2375; 2744). Dr. Rosner's statement that he is presently associate professor at Rutgers Medical School in neurosurgery and anatomy (Tr. 1686), was clarified by Dr. Somberg that Dr. Rosner is part of the preclinical sciences in the department of anatomy at the New Brunswick school, not at the New Jersey College of Medicine in Newark. (Tr. 2378).

5. The defendant makes much of the fact that Dr. Somberg never was given access to three EEG reports of tests performed on Di Gilio in October 1953 and June and November 1955, which Dr. Rosner characterizes as being abnormal. The reports, Exhibit D appended to defendant's brief, indicate the dates the tests were performed. The October 7, 1953 test was performed nine days before Di Gilio's prizefight with one Henry Winchman at the St. Nicholas Arena which Di Gilio won in an eight round decision. The June 24, 1955 EEG was performed one week after Di Gilio was reinstated by the Boxing Commission. The November 14, 1955 test was performed four days before Di Gilio's bout with one Tommy Barto at Madison Square Garden which Di Gilio

(Cont'd)

examination of Di Gilio and the x-rays, Dr. Somberg concluded that the defendant has some cerebral dysfunction on the right side of the brain, some vascular disease manifested by his borderline hypertension and has a prior history of cerebral trauma. (Tr. 2381). The court asked Dr. Somberg to interpret the x-rays (D-24 and D-25) which Dr. Rosner had testified disclosed the existence of an angioma in Di Gilio's cerebral cortex. As to D-24, Dr. Somberg stated that what Dr. Rosner identified as an angioma, "is a vascular channel in the bone and is quite normal." (Tr. 2382). As to D-25, Dr. Somberg stated:

> First of all, it's impossible to pick up an angioma of the cortex on an x-ray of the skull. If life were that simple we wouldn't have to do angiographies, CAT scans and all the other things. All this shows is a normal vascular marking or channel of the middle meningeal artery and its branches in the skull.

(Tr. 2382).

The court asked Dr. Somberg's opinion whether, based upon his examination of the x-rays and the patient, Di Gilio has an angioma in either the cerebral or the cervical cortex. In response, Dr. Somberg stated that it was not demonstrated by

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(Cont'd)

won by a TKO in the fifth round. What is significant here is that the medical personnel who performed and evaluated these tests at the time they occurred did not find them abnormal in any sense so as to preclude Di Gilio from continuing with his boxing career. More relevant to the inquiry here is that Di Gilio had multitudinous EEG's performed within a two to three year period prior to first being examined by Dr. Somberg, as well as additional EEG's performed during the period between Dr. Somberg's two examinations — all of which proved negative.

the x-rays, nor really demonstrated by the clinical neurological findings, although he did find "subtle, minor signs pointing to something on the right side." (Tr. 2390). The court set forth the *Dusky* test for Dr. Somberg and asked whether he knew of any reason how, or why, Di Gilio's organic brain disease could permit him to function normally or near normally without stress and yet would render him incapable of adequate cerebration with stress; in other words, why he should become incompetent under periods of emotional stress but remain reasonably competent in a quiet, calm environment. Dr. Somberg responded that he knew of no reason. (Tr. 2393-94).

Dr. Somberg explained:

> First, Mr. Digilio is right-handed. In a right-handed individual the left cerebral hemisphere is the one that is the so-called dominent one. The left temporal lobe controls speech and the left frontal lobe is responsible for intellectual achievement, personality, and really that's what distinguishes a human being from other forms of animal matter. Projecting hundreds and hundreds of patients with strokes, tumors, other lesions involving the non-dominant hemisphere, meaning the right side, which we have here, I've never seen this clinical picture on an organic basis.

(Tr. 2395). Dr. Somberg opined that Di Gilio is competent to undergo the sentencing procedure and undertake the responsibilities mandated by the *Dusky* test. (Tr. 2398). He so concluded, stating: "I've seen and examined the man twice. His degree of organic brain syndrome is minimal and it's on the

nondominant side, so that the organic process is not a factor in preventing him from undergoing this proce[dure]." (Tr. 2399).

Di Gilio had undergone at least one CAT scan prior to Dr. Somberg's testimony in November 1978. The CAT scan proved negative, and numerous EEG's had been normal during that period. (Tr. 2403). Dr. Somberg concluded that Dr. Rosner's theory of the angioma on the right side which engorged with blood during periods of stress causing Di Gilio's irrational behavior, was an inconceivable hypothesis based upon negative EEGs and brain scans. (Tr. 2404).

On November 16, 1978, Di Gilio was to undergo a CAT scan. As the actual scan began to take place, he suffered what appeared to be some sort of seizure and the scan was aborted. Because of the importance of a CAT scan as a diagnostic tool, Dr. Somberg requested that such a test be performed prior to his testimony. The scan was scheduled for the evening of November 20, 1978 so that a doctor would be in attendance to sedate Mr. Di Gilio in light of the earlier episode. I find it to be of some significance that the afternoon of November 20 the appointment for the CAT scan was cancelled by Di Gilio. (Tr. 2380-81). The CAT scan would have been the strongest support for Dr. Rosner's angioma theory if the lesion had appeared where he concluded it existed.

Dr. Somberg concluded that in light of all the diagnostic tools available, the x-rays and EEGs and brain scans as well as his examination of Di Gilio and the other medical reports, the most likely diagnosis is that the defendant suffers from numerous petechial hemorrhages due to repreated trauma over many years (Tr. 2735-36), and that a person in such condition is not uniquely susceptible to stress so as to have his intellectual

reasoning and judgmental capacities seriously reduced during periods of stress. (Tr. 2736). Finally, Dr. Somberg concluded that Di Gilio's presence during a sentencing proceeding would have no effect on his organic picture. (Tr. 2767-68).

Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist it would be on the non-dominant side thus not affecting the intellectual ability and personality of the defendant, the psychiatric and psychological evaluations made by the defense witnesses become incidental to the determination. Also collateral to the determination that Di Gilio is competent to be resentenced are the existence of the tape recordings. Dr. Somberg did not listen to or view them, and his conclusions were in no way based upon them.[6]

The sentencing procedure is neither complex nor time-consuming. The defendant is to be sentenced on two misdemeanor counts, for which he faces substantially less

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6. Although I have not based my determination of the ultimate issue in any way upon the tapes, they are interesting in that during the period in which they were made, Dr. Robert Latimer, a defense psychiatrist, wrote a report that stated that it was virtually impossible to establish a conversation with this patient [Di Gilio]. (Tr. 2292-93). At the same time, Dr. Kritzberg, Di Gilio's psychiatrist, testified that he had no trouble talking to and understanding his patient. (Tr. 1994). The tapes indicate that Di Gilio was certainly able to converse in an understandable manner within the limited subject matter covered. Whether or not those conversations took place in an atmosphere of greater or lesser stress than in the medical offices of Dr. Kritzberg and Dr. Latimer, is a matter that need not be determined.

Because of the non-reliance by this court and by Dr. Somberg on the tapes, defendant's argument concerning any violation of his constitutional rights and the *Massiah* doctrine, *see* Defendant's Brief at 86-91, is moot.

exposure than he did on the original felony convictions. At the time of sentence after the 1975 trial, Di Gilio exercised his right of allocution. I have already found that Di Gilio was competent throughout those proceedings in my opinion of November 2, 1977. What remains to be done is for an updated presentence report to be prepared. Since Di Gilio was competent at the time of his original sentence in this case, he was able to and did confer with his counsel about the veracity of his presentence report.

When the updated report in presented to the court, Di Gilio need only consider the portion dealing with the time period since his prior sentence before me. Pending criminal actions in any jurisdiction will certainly not be considered since they have not been concluded. If there are any convictions in the record since he was last sentenced here, I feel confident that the veracity of their factual circumstances will be made known to me by the defendant as well as his counsel.

As far as mitigation is concerned, it is inconceivable that a more complete record could be made as to the defendant's physical and mental condition by having him speak. Should he choose to speak on matters relevant to punishment, he will have my attention as long as he desires. Should he remain silent, he can be secure in the fact that his counsel in this case have made the most highly professional effort possible, an effort of herculean proportions. I have watched the defendant carefully during the extended period of these hearings. I am not unmindful of the fact that he has a wife who is devoted to him and cares for him deeply.

I am convinced that the defendant is able to confer with his counsel in such a way that he can understand that a sentencing

proceeding involves the concept of punishment. Many criminal defendants do not believe that they should be punished because they believe that they have been wrongly convicted. They may claim they do not know why they are to be punished. Suffice it to say they have a rational understanding of the concept if they can be made to realize that they may be deprived of their liberty for a period of time, or caused to pay a fine. I am absolutely convinced that the defendant has the ability to understand that concept.[7]

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7. In deposition, Larry Bronson, Esq. testified that he is Di Gilio's counsel in a pending State proceeding involving charges of conspiracy and loansharking. About the State indictment, Bronson noted: "I have attempted to explain to him what the case is all about. It is a conspiracy, engaging in loansharking. The concept of loansharking money for interest does not escape him." Bronson deposition of June 15, 1979 at 12. Bronson goes on to state that Di Gilio does not, however, grasp the concept of vicarious liability of co-conspirators. Di Gilio is not alone in his failure to grasp that concept — there are members of the bar who have difficulty in that area.

Bronson further testified about an incident at the State Grand Jury where Di Gilio "castigated me for not noting a difference on the record," when the prosecutor referred to a detective as a prosecutor. Bronson deposition, *supra*, at 19.

These two incidents make it clear that Di Gilio is more sophisticated in his knowledge of the law and the legal process than he would like this court to believe.

Moreover, Bronson stated: "I'm fairly certain he could understand the concept that he is being punished and he's going to jail, such as a small child would be punished. . . ." Bronson deposition, *supra*, at 17. Small children that understand the concept of punishment do so because they understand right from wrong.

Appendix G

The evidence presented in this *de novo* competency hearing preponderates in favor of a finding that John Di Gilio does not suffer from the kind of organic brain disease which he has asserted as the basis for an alleged incompetency to be resentenced. Without that organic disease linchpin, the carefully perceived functional overlay becomes too transparent a structure to support the defendant's theory. I find that under the *Dusky* standard Di Gilio is competent to withstand the rigors of the sentencing procedure and is able to participate in that procedure to the extent commensurate with his obligation thereunder.

The court will submit its own order.

DATED: October 10, 1979.

APPENDIX NOTE OF DEFENSE COUNSEL

The following order of October 10, 1979 amends a paragraph which is the last full paragraph on the bottom of page 321a of the preceeding opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-314

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN DI GILIO,

Defendant.

Appendix G

ORDER

IT IS on this 12th day of October 1979 O R D E R E D that the last full paragraph contained on page 10 of the opinion of the court dated October 10, 1979 is stricken and the following substituted therefor:

There was equivocal evidence that Di Gilio had undergone a CAT scan at Roosevelt Hospital. It is insufficient upon which to base a finding that a CAT scan was actually performed. Skull x-rays taken at that time were negative as were numerous EEGs taken prior to Dr. Somberg's testimony in November 1978. Dr. Somberg concluded that Dr. Rosner's theory of the angioma on the right side which engorged with blood during periods of stress causing Di Gilio's irrational behavior, was an inconceivable hypothesis based upon negative EEGs and brain scans. (Tr. 2404).

s/ H. Curtis Meanor
H. CURTIS MEANOR
U.S.D.J.

APPENDIX H — ORDER PURSUANT TO OPINION DATED OCTOBER 10, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-314

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN DI GILIO,

Defendant.

For the reasons set forth in this court's written opinion filed this date finding defendant John Di Gilio competent to be sentenced in this matter.

IT IS on this 10th day of October 1979 O R D E R E D that John Di Gilio appear with counsel on Friday, November 9, 1979 at 9:30 a.m. for sentence.

s/ Meanor
H. CURTIS MEANOR
U.S.D.J.

APPENDIX I — SENTENCING TRANSCRIPT DATED DECEMBER 14, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 74-814

UNITED STATES OF AMERICA,

-vs-

JOHN DI GILIO,

Defendant.

Newark, New Jersey
December 14, 1979

BEFORE:

THE HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

ROBERT J. DEL TUFO,
United States Attorney
BY: WILLIAM F. MADERER
Assistant U.S. Attorney
For the Government

MICHAEL A. QUERQUES, ESQ.
-and-
ROGER A. LOWENSTEIN, ESQ.
Attorneys for the Defendant

MR. MADERER: United States would move the sentence of John DiGilio in Criminal Number 74-314.

THE COURT: Mr. Querques.

MR. QUERQUES: With your Honor's permission, I am perfectly satisfied that your Honor is as well informed about the case, about Mr. DiGilio as anyone could be and I will even concede, at least in a medical respect, that your Honor is probably more in tune than I am, because you have a better understanding of the medical situation, you certainly, however, do not have the practical approach to the situation since you have not seen the man in any number of circumstances.

With that I really have nothing else to say. But I do want to take the time to read from the letter of Dr. Gagliardi which is dated October 31st, at least in part, because I think that it sums up the entire situation in a rather objective way.

It says: "The next issue that must be looked at and discussed, however, is the possibility of Mr. DiGilio's imprisonment. This man has an organic mental disease. This is not disputed by anyone, to my knowledge. Because of his illness, Mr. DiGilio shows poor recent memory, poor impulse control, labile affect, paranoia olfactory and auditory hallucinations, abrupt changes in his blood pressure, transient ischemic accidents, difficulty concentrating, to name but some of his signs and symptoms. Confinement, particularly in a strange location, will undoubtedly, aggravate at least some, if not most, and possibly all, of Mr. DiGilio's symptoms. I understand that, if Mr. DiGilio is guilty of crimes, 1) Society be protected from him; and 2) He should be punished by these crimes. But punishment should not, in my opinion, be cruel and inhuman. It

is my understanding that incarceration is supposed to punish someone by removing their liberty, as well as some of their rights as a citizen. In that sense, incarceration is 'harmful' to everyone. Mr. DiGilio is a special case, however. For, not only would he be robbed of his liberty and certain of his rights, he would, undoubtedly, be made ill. In my opinion, this is cruel and inhuman punishment. Confining Mr. DiGilio in a strange place would be, to my mind, analogous to forbidding a diabetic to eat sugar, or making someone with a weakened heart run a long distance."

THE COURT: Excuse me one moment.

(Pause.)

MR. QUERQUES: With the entire background of this matter in mind and with those remarks, Dr. Gagliardi, which states the situation as well as anybody can state them, we are going to rely upon your Honor's good conscience good judgment and his best judicial discretion in being as lenient as he possibly can under all the circumstances.

THE COURT: Mr. Querques, at the last time Mr. DiGilio was sentenced in September, I believe, of 1975, you had a chance to go over the original presentence report. I do have an updated report which I ask whether or not you have seen. If you haven't I'll give you a minute to look at it.

It really doesn't add much that we don't already know and is not contained in the record before me. But it goes to the history of the case, the dispositions of the other defendants and certain reports of interviews with Mr. DiGilio and with his wife.

MR. QUERQUES: I have had the opportunity; your Honor, to glance at it. I make no particular comments about it other than which is obvious, and that is that there has been a great deal of difficulty in communication between the probation officer and Mr. DiGilio for the obvious reasons of his condition with respect to the factual material in there, children, background, I'm satisfied it is substantially accurate.

It's just a pity that he didn't take more time in an effort to try to communicate with John so that he could give you again, from a practical viewpoint, an honest man's evaluation of what it is that makes John tick.

THE COURT: Mr. DiGilio, you're here before the Court to be sentenced on two misdemeanor charges. Count 1 follows your conviction for a conspiracy to obtain Government property valued less than $100 in violation of Title 18 United States Code Section 371. Count 2 is the substantive offense of the theft of Government records with a value less than $100, Title 18 United States Code Section 641.

On each count you face maximum penalties of one year in prison and $1,000 in fines or if sentences are consecutive or accumulative a total of two years imprisonment and $2,000 in fines.

You have a right of allocution, Mr. DiGilio, and you have a right to address the Court in any subject relevant to the imposition of sentence. Is there anything you'd like to say I'll hear you now.

DEFENDANT DI GILIO: No.

THE COURT: All right.

Mr. Maderer, anything you'd like to say?

MR. MADERER: Your Honor, I've previously set forth the views of the United States in our letter to you dated October 22, 1979. And i would just reiterate those views that we believe Mr. DiGilio should be sentenced to the maximum sentence under the law.

THE COURT: This case has a long history. Mr. DiGilio was tried before me in the summer, in July of 1975. He was convicted of two felonies, conspiracy to purloin Government property with a value in excess of $100, plus the substantive offense of actually stealing Government property with a value in excess of $100.

Mr. DiGilio appealed his conviction. The offense involved Mr. DiGilio's efforts and success in obtaining copies of FBI files, particularly those pertaining to him through the efforts of one Irene Klimansky and her friend, a young man named Kuczynski.

Klimansky worked for the FBI, apparently a clerk typist, and at the urging of her fiance, who was encouraged by Mr. DiGilio and others, as I recall the evidence, Miss Klimansky was able to photostat and take out copies of documents from the FBI, hiding them in her girdle or her sewing basket or knitting bag, whatever.

On appeal the Court of Appeals determined there was no evidence that the value of the property stolen was in excess of $100, in effect reduced the convictions to two misdemeanor convictions rather than two felony convictions and remanded the case for resentencing.

Appendix I

The Court of Appeals also remanded the case for redetermination of Mr. DiGilio's competency in June of 1975. After eight days of trial I had determined John DiGilio to be competent. And the Court of Appeals held that I had misapplied the burden of proof, placing the burden of persuasion of incompetency on the defendant rather than the burden of proving competency upon the Government.

The Court of Appeals left it to me to determine whether I could redetermine John DiGilio's competency on the basis of the prior record. I felt that I could and did so. And even with the shift in the burden of proof it came out to the same result, and I filed an opinion to that effect that John DiGilio was in fact competent to stand trial in July of 1975.

That did not end the matter.

Mr. DiGilio was here in another indictment, 74-313, as I recall it, an indictment for obstruction of justice basically. His competency had to be determined in relation to that prospective trial as well as his competency to undergo the sentencing proceeding that is going on today.

Lengthy hearings were held over a long period of time interrupted by pressures on me from other litigation.

My view that now that the case, was down to two misdemeanors it was certainly not the most pressing matter I had and engagements of counsel, attempts to negotiate the case between the Government and counsel and the necessity of gathering rather sophisticated medical evidence. After it was all done the Government dropped 74-313 and, therefore, the competency determination only involved Mr. DiGilio's competency to undergo this proceeding.

Appendix I

I've studied medical reports, hospital records and testimony on Mr. DiGilio. There is no question in my mind but that Mr. DiGilio has some from of organic brain disease, probably due to repeated head trauma from his pugilistic endeavors as well as some traumatic incidents that he has undergone since that time.

In my judgment this organic brain disease has occasioned some impairment on Mr. DiGilio's mental capacities but applying the legal tests I came to the conclusion he was not incompetent in the legal sense to undergo judicial proceedings.

That brings us to today where we are at Mr. DiGilio's sentencing.

In 1975 Mr. DiGilio — strike that.

In 1974 Mr. DiGilio was under indictment before Judge Barlow in a loansharking case, the result of which was his acquittal.

As a consequence of that case, Judge Barlow ordered Mr. DiGilio to Springfield, Missouri for a study. Mr. DiGilio was there, to my recollection, 77 days. Had he been convicted before Judge Barlow he would have received credit on any sentence that Judge Barlow imposed for that time spent in Springfield. Since that Springfield study was not technically related to this case he would not get credit in any sentence I imposed for that 77 days.

He is entitled to 48 days credit on any sentence I impose on this case. So whatever sentence I give him on this case will be reduced by the 48 days he's already spent in custody in relation to the indictment that we are working on today.

Appendix I

The Springfield study that was conducted at Judge Barlow's order played a significant part in the competency hearing of John DiGilio in June of 1975. If he had not undergone that study in regard to Judge Barlow's indictment, which led to an acquittal, I am rather certain that he would have undergone the same or similar study in relation to this indictment and 74-313.

I think in fairness to John DiGilio, no matter if he is what the Government says he is, he's entitled to that 77 days credit in any sentence that he receives here simply because there was no other way to give him credit for it. If he had been convicted before Judge Barlow he would have gotten the credit and that study played a significant part in the competency determination in this case.

As I said before, if he hadn't undergone it in relation to another indictment he would have undergone it in relation to this case.

Therefore, the following will be the sentence and judgment of the Court: On Count 1 of the indictment John DiGilio is sentenced to the custody of the Attorney General for a period of 9 months. In addition, he is fined $1,000.

On Count 2, the imposition of sentence is suspended. Mr. DiGilio is placed on probation for 5 years. Said probation to begin at the conclusion of the custodial term imposed in Count 1. And on Count 2 he is also fined the sum of $1,000. The 9-month sentence instead of the maximum year's sentence will give Mr. DiGilio full recognition and credit for the 77 days that he spent in custody in Springfield on the study ordered by Judge Barlow and on the 9-month sentence he will, of course, be entitled to what I believe are 48 days custody in relation to this case.

Mr. Towers will draw the appropriate judgment.

MR. QUERQUES: With your Honor's permission, may we ask that the bail be continued because we contemplate taking an appeal as your Honor can appreciate.

THE COURT: You have a notice you can file today?

MR. QUERQUES: I have a notice that (illegible)

THE COURT: Will you file it today?

MR. QUERQUES: Yes, your Honor.

THE COURT: What is the present bail? Anybody know?

My recollection is $50,000 surety.

MR. MADERER: It is a surety bond.

MR. QUERQUES: I don't know the exact amount, your Honor.

THE COURT: I'm perfectly willing to continue the bail pending appeal from my determination that Mr. DiGilio is competent to undergo sentencing. I don't believe the appeal is frivolous. I'll continue it.

Now, as I explained to you gentlemen in chambers, there may be a problem with relation to extending this particular bail bond.

As I think you're aware, there are conflicting Court of Appeals decisions on an old form we used to use as to whether a trial surety bond could be extended for appeal purposes. We have since cured that problem by changing the language of the bond form. But this case is sold old it may be the old language and there may be some legal problem with extending it. I'll leave that to you and Mr. Maderer to work out.

MR. QUERQUES: Yes, sir.

THE COURT: It may — I think if it's the old language here, I think if you can get some commitment from the bonding company to conform it to the new language that will be satisfactory to me and probably to the Government.

MR. MADERER: As your Honor knows (illegible) already submitted papers to the Court pursuant to the United States Code, that is, Title 18, United States Code, Section 3148.

For the record, I would just like to read the application of the United States to have Mr. DiGilio's bail be denied and have him remanded immediately for both the reasons that any appeal from your Honor's determination of competency would be frivolous and because in the United States' view Mr. DiGilio does present a danger to the community.

Your Honor, I know your Honor has ruled on that, I want the record to reflect the position of the United States.

THE COURT: I can't say the appeal is frivolous. It gave me enough problems so I think it's appropriate that the Court of Appeals look at it.

Second, as far as I know, Mr. DiGilio has only the one conviction, plus another one many years ago.

MR. QUERQUES: Many years ago, for assault. It must be 25 years old.

THE COURT: It must be 20 or 25 years.

He is under indictment in the State Court under bond there. I can't say based on my recent case involving United States v. Provenzano Mr. DiGilio's past history as I know it, verified on the record, makes him a danger. Besides, I don't think we do much, accomplish much even if he were dangerous by mooting his appeal in effect, by putting him in jail for what, 6 months?

So I'll deny the Government's application to commit John DiGilio at the present time.

MR. QUERQUES: I just wanted to record on the record, this morning we supplied to the Government and your Honor two additional points —

THE COURT: Do you want me to file them?

MR. QUERQUES: Yes. That's why I gave them to your Honor.

It's Dr. Edward Thaler's report of November 27, 1979 and the report of Dr. Abrahamsen dated September 12, 1979.

THE COURT: We can either file them or mark them as exhibits.

MR. QUERQUES: I'd like to have your Honor mark them.

THE COURT: Why don't we mark these, Mr. Towers, courts exhibits in connection with this proceeding.

THE CLERK: C-1 and C-2.

(C-1 and C-2 received and marked in evidence.)

DEFENDANT DI GILIO: Thank you, Judge.

THE COURT: Good-by, Mr. DiGilio.

DEFENDANT DI GILIO: I hope I never see you again.

THE COURT: I hope I don't see you again. You and I have the same thought.

Mr. Towers, in connection with this case, the Government has filed an application of one Paul Bertelli, an FBI agent. It refers to continuing ongoing matters. I want to file it under seal.

APPENDIX J — JUDGMENT ORDER DATED JULY 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2835

UNITED STATES OF AMERICA

v.

JOHN DI GILIO
JOHN GRILLO
HARRY LUPO
PATER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KLIMANSKY) KUCZYNSKI

John Di Gilio,

Appellant.

Appeal from the United States District Court for the District of New Jersey

(D.C. Crim. No. 74-00314-01)

Argued July 9, 1980

Before: WEIS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges.*

Appendix J

Michael A. Querques, Esq.
433 Central Avenue
Orange, New Jersey 07050

Maurice C. Brigadier, Esq.
Seymour Margulies, P.A.
921 Bergen Avenue
Jersey City, New Jersey 07306

Attorneys for Appellant.

Robert J. Del Tufo
United States Attorney
Federal Building
Newark, New Jersey 07101
Attorney for Appellee.

After considering the contentions raised by the appellant, to-wit,

(1) That the district court erred in finding appellant competent throughout trial and resentencing;

(2) That the district court erred in November 1977 when it made a retroactive determination of appellant's competency during his 1975 trial given that (a) the burden of proof was now on the government, (b) the record did not include the "thing amiss" that occurred during the trial and (c) the decision was based on a proceeding completed two years earlier, which included reports from 1974 and earlier;

(3) That the district court was bound by the "beyond a reasonable doubt" standard, or at the very least, the "clear and convincing standard" of *Addington v. Texas,* 441 U.S. (1979); alternatively that the district court erred in applying the doctrine of law of the case to preclude the Supreme Court's *Addington* decision from applying to the district court on remand from the court of

appeals, which opinion, rendered prior to *Addington,* utilized the preponderance standard, and the law of the case doctrine does not bar this court from following the *Addington* "clear and convincing" standard;

(4) That the district court erred after the completion of the extended hearing to determine competency to be sentenced, by (a) not utilizing that record to determine that Di Gilio was not competent throughout the trial although it contained proof of such incompetency, and (b) by failing to accord psychiatric and psychological testimony the weight and consideration to which it is entitled and by confusing the burden to prove the existence of incompetency with the burden to prove the cause of incompetency, and (c) continuing to place the burden of proof of competency on the defendant;

(5) That the district court made inadequate and erroneous finding of facts;

(6) That the doctrine of *Massiah v. U.S.,* 377 U.S. 201 (1964), and the defendant's correlative Fourth, Fifth and Sixth Amendment rights apply in a competency proceeding pursuant to 18 U.S.C. §4244 and, therefore, the defendant's rights were violated, and that this court may not take cognizance of the contents of tape recordings which were not the subject of fact findings below;

(7) That the doctrine of *Brady v. Maryland,* 373 U.S. 83, 10 L.Ed. 2d 215 (1963) mandates dismissal of the prosecution because of the government's bad faith seizure of the audio tapes and transcripts,

Appendix J

ORDERED and ADJUDGED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Weis
Circuit Judge

Attest:

s/ Thomas F. Quinn, Clerk

DATED: Jul 15 1980

APPENDIX K — ORDER DENYING REHEARING DATED AUGUST 6, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2835

UNITED STATES OF AMERICA

v.

JOHN DI GILIO, JOHN GRILLO, HARRY LUPO, PETER SZWANDRAK, GEORGE KUCZYNSKI, IRENE (KLIMANSKY) KUCZYNSKI

John Di Gilio, *Appellant*

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix K

By the Court,

s/ Weis
Judge

Dated: August 6, 1980

APPENDIX L — ORDER STAYING MANDATE DATED AUGUST 15, 1980

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2835

UNITED STATES OF AMERICA

vs.

JOHN DI GILIO
JOHN GRILLO
HARRY LUPO
PETER SZWANDRAK
GEORGE KUCZYNSKI
IRENE (KLIMANSKY) KUCZYNSKI

John Digilio,

Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 5, 1980.

s/ Weis
Circuit *Judge*

Dated: August 15, 1980

APPENDIX M — RECORD OF PETITIONER'S LISTING OF HALLUCINATIONS

Psychological Report Re: John DiGilio
Referred by F. Spitzer, M.D.
Date: May 20, 1975

OBJECT OF ASSESSMENT:

1. Personality
2. Organicity
3. Differential Diagnosis

TESTS ADMINISTERED:

1. Rorschach
2. Three Wishes plus Elaboration
3. Thematic Apperception Test
4. Wechsler Memory Scale
5. Bender Gestalt
6. Logical Memories

PRESENTING COMPLAINTS:

Mr. DiGilio described a history of severe chest pains. He also stated that he was suffering from a pain and a burning sensation in the right side of his head.

PSYCHOLOGICAL ASSESSMENT:

Clinically an organic psychosis is currently manifest. His personality is in a state of disorganization and symptoms were manifest in the cognitive, affective and behavioral spheres of functioning.

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Mentation is impaired. His thoughts take on distinct paranoid trends. He feels that people are talking about him behind his back and playing games with him. Hallucinations of an organic type are also indicated. For example he perceives flashes of color as well as perceptual distortions of which body figures are increased or decreased in magnitude. He also has suffered hallucinations in the auditory modality as for example thinking that he heard someone calling his name from outside the hall. There is a ringing and a sensation of a motor buzzing in his ears which has been longstanding. His thinking is extremely concrete and he is unable to perceive abstract relationships nor appreciate the intrinsic meaning of proverbs. He was disoriented in time in that he did not know the day or his correct age. He was also unable to name this Clinic nor remember the name of the president. On occasion he may also experience disorientation of body image but this is a transient symptom and probably exaggerated by anxiety. He also reports anaesthesia to his hands and face as well as excessive perspiration. Somatic symptoms of a varying nature were related which are so excessive so as to take on delusional qualities. He is obsessionally preoccupied and unable to concentrate. Judgment is impaired but he does have enough insight to appreciate the severity of his problems although not the origins.

Affect is unstable. He may exhibit periods of moodiness and disinhibition of affect. Transient depressions may also be observed. There is an element of unpredictability to his behavior and self control is poor. Interestingly his perceptual distortions make it difficult for him to function and he is exceptionally sensitive to movement in his visual field.

He does not present signs for an aphasia but there are definite intellectual deficits. It would not be prudent to assess his I.Q.

insofar as his intellectual potential is severely reduced by his organic condition. Frustration tolerance is low and he may find it virtually impossible to sustain his activity towards the achievement of long term goals. Instead he is stimulus bound.

Consciousness may be marked by consciousness may be marked by confusion to the point where he cannot function in any meaningful way. This further elevates his anxiety which in turn adds further to his depression and inability to function. Somatic symptoms may be manifest when he is in such a hyperaroused condition. While he denies nervousness he is, in fact, quite tense and preoccupied with his condition. There is an element of despair and futility as well. Projective testing revealed some depressed anger for which he lacks clear and mature sources and forms of expression. He is basically wrought up to the point where he can neither think clearly nor behave adaptively.

Projective testing did not reveal underlying psychodynamic conflicts. He is presenting a variety of pathological symptoms but these have probably evolved consequential to his organic disorder. He does not appear to be malingering insofar as he was motivated on the performance tasks. He is apprehensive about his future and seems resigned to his condition. He is regretful of his career as a boxer and realizes his foolishness in not heeding medical advice even after he was forewarned not to continue after signs of brain injury were detected.

In conclusion, Mr. DiGilio is presenting an organic psychosis at this time. His symptoms are pervasively manifest and severe enough to the point where his abilities to continue functioning have been significantly impaired. The prognosis is guarded and hopefully he will be able to maintain some form of social adjustment provided that he can be placed in a structured

situation or perhaps even a sheltered workshop where anxieties, competition and threat are minimized.

s/ R. Tarter
Ralph E. Tarter, Ph.D.
Consulting Psychologist

RT/meb

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Signature and title)
	~~inmate has had dizzy spells at other times. Inmate has had psychiatric treatment at Springfield Penitentiary and Bernadsville Institute in N.J. C~~ Lately, inmate has been complaining of hearing voices.
	C J Ruggiero
9/11/74	Received his present prescription from today - glasses from below
	Jos. Vigil
9/12/74	I called Springfield med. Center and spoke to Mrs. Cox, Med Records. The following was learned: (1) Mrs. Digilio departed Springfield on 5 Sept 1974. (2) Patient denies any seizures prior to 1969. (3) was on Detention but was D.C.'d on 19 July 1974. Was then on medical surveillance and remained 3 Sept 1974 when it was D.C.'d. (4) Diagnosis on form 71 on transfer was (a) Personality disorder, anti social type and organic brain syndrome, Post Traumatic. Copies of narrative summary will be sent to us.
	E M Sheeran
	Hdqs

Standard Form 509
Revised August 1954
Bureau of the Budget
Circular A-32 (Rev.)

Neurologic Exam Page Five G

A CLINICAL RECORD — PHYSICAL EXAMINATION

DATE OF EXAM	HEIGHT	WEIGHT (ARRIVAL / DISCHARGE / PRESENT)	TEMPERATURE	PULSE	BLOOD PRESSURE
9/12/74					

INSTRUCTIONS.—Describe (1) General Appearance and Mental Status; (2) Head and Neck (General); (3) Eyes; (4) Ears; (5) Nose; (6) Mouth; (7) Throat; (8) Teeth; (9) Chest (General); (10) Lungs; (11) Cardiovascular; (12) Abdomen; (13) Hernia; (14) Genitalia; (15) Rectum; (16) Prostate; (17) Back; (18) Extremities; (19) Neurological; (20) Skin; (21) Lymphatics.

what below normal.

Chief Subjective Complaints:

1) Headache not constant;
2) Vertigo, also, not constant.
3) Buzzing in head *
4) Mild anterior chest pain ~~e~~ exacerbations.
5) Unsteady Gait
6) Frequent fainting spells with momentary loss of consciousness.

Most of symptoms are subjective.

Impression: Loss Brain Damage Syndrome secondary to previous injuries

(Continued on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: name—last, first, middle; grade; dept; hospital or medical facility)

REGISTER NO. 21892-179 | WARD OR CLINIC

DiGilio, John

FEDERAL DETENTION HDQTRS.
427 WEST STREET
NEW YORK, N.Y. 10014

PHYSICAL EXAMINATION
Standard Form 509
509-104

DATE	SYMPTOMS, DIAGNOSIS, TREATMENT, TREATING ORGANIZATION (Sign each entry)
9/13/74	B.P. 166/98 - pulse 80/min, Regular: Lungs clear Vertigo present - ℞ Dramamine tablets 0.25mg S - One tab p.o. ℞ Dramamine 50mg S - One tab t.i.d p.r.n for 5 days A.J. Ruggiero
9/16/74	Inmate complains of headache, x "buzzing in head" No evidence of acute distress physical or other symptoms ℞ Fiorinal tab S - One tab t.i.d. p.r.n. for 5 days A.J. Ruggiero
9/17/74	Inmate c/o complaints of headache / B.P. 154/94 Heart & lungs: N/C Abdomen: Soft / N/T Tenderness ℞ Discontinue Sinasil x Fiorinal ℞ Aldomet 250 mg S - One tab t.i.d

G

CLINICAL RECORD	DOCTOR'S PROGRESS NOTES (Sign all notes)
DATE	
9-12-74	Pt has a history of serious head injuries over many years secondary to boxing, and an accident in 1969. Encephalopathy in 1969 he has been evaluated both psychiatrically and neurologically, including an inpatient stay at the Bermudez Institute. He complains of depression particularly in standing up, feelings of unreality, hearing a unexplained sounds, and difficulty concentrating - which leads to some memory difficulty, some unsure of paroxysmic sharp does exclude considerable anxiety, some memory impairment (previous dates for evidence) and difficulty sometimes picking up the thread of his conversation. By there is no manifestation of psychosis in the interview, she is cooperative, friendly and has good contact * sleep. Probable Depression masked under acute anxiety - to be observed further.

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name - last, first, middle; grade; date; hospital or service of facility)
DIGILLIO, John

REGISTER NO. 218832175 | WARD NO. Hosp.

FEDERAL DETENTION HEADQUARTERS
427 WEST ST. NEW YORK
NEW YORK 10014

DOCTOR'S PROGRESS NOTES
Standard Form 509
May 1969 (Rev.)
General Services Administration
Interagency Committee on Med Records

Appendix M

John Di Gilio 24050
5/19/75

* * *

electrocardiogram appears within normal limits, but his CPK is elevated to 119 and Dr. Atkinson has advised LDH iso-enzymes to be done. He will also be seen on neurological consultation this evening and his chest x-ray shows some possible abnormality and Dr. Godfrey has suggested a PA chest and deep inspiration and left lateral deculitis.

Frank P. Spitzer, M.D./jt

5/23/75
The patient has again continued to be somewhat labile in his emotional reactions and responses and today smashed some of his dishes at lunchtime. Otherwise he continues to complain of pain in the left chest and dizziness. The repeat x-ray of the chest shows some possible fluid in the lungs and he will be having further medical consultations for this. We have not yet received the medical records from Saddlebrook Hospital. In the interview situation the patient has now reminded me that he is not here for me to know anything about why he is here, except for his evaluation and becomes quite hostile and paranoid if he thinks that I am asking any sort of supposed questions that he does not like. Otherwise during the same interview he will rather happily refer to me as a good looking handsome fuck. At other times he will accuse me of possibly being a cop instead of a doctor. He has also made some threatening remarks to some of the male attendants on his floor, that if they don't watch their step he may have some of his boxer friends take care of them.

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Frank P. Spitzer, M.D./jt

5/24/75

The patient continues to complain of loud noises, of trucks outside his door and window at night and loud voices of people calling in and telling him to do various commands, such as go out, get up, or walk around and cannot identify who these voices are. He denies being able to see these trucks or people. He continues to complain of a burning in his right scalp and head area and today he complained of hurting and aching all over his entire body and his muscles and joints. He says that his friend and somebody else came down to see him last night. For the most part he remains quiet, withdrawn, isolated, either lying on his bed or sitting by himself on his chair with little or no attempt to socialize with anybody. He speaks of wanting to go home and continue seeing Dr. Kitzberg in New York City and says that his friend can continue to drive him back and forth to the doctor's office there. In the meantime he remains on Valium 5 mg. four times a day as needed and Nitroglycerin. Since there has not yet been any evidence of any kind of convulsions, he has not yet been on any specific anti-convulsive medication.

Frank P. Spitzer, M.D./jt

5/27/75

Dr. Atkinson indicates that the patient shows evidence of cardiomegaly, and feels that his complaints of left chest pain radiating to the neck and mouth are consistent with possible angina. He recommends a cardiac stress test. However, this cannot be arranged this week and therefore this would be optional at anytime after the patient leaves. In spite of the cardio-pulmonary disease, at the present time Dr. Atkinson does not consider this a specific medical contraindication to any

possible testifying in court at least at the moment. In the meantime I have talked with Mr. Robertson in the attorney's office who informs me that the patient should leave here within the ten day limit, which will be tomorrow and therefore I have also talked with the patient's wife today and with Dr. Flicker, the referring psychiatrist, notifying him that Mr. Vergillito will pick him up for discharge tomorrow morning. The patient came upstairs to my office today for another visit and indicates that he did not have any nightmares last night, that he can remember, and today has not yet had any of the visual phenonema, such as flashes of red lights, that he periodically sees. This and the previous mentioned behavior and clinical appearance has continued to be somewhat variable, though the vast majority of the time he remains relatively isolated and still has periodic episodes of being withdrawn and blank, and apparent inattentiveness and short term memory lapses for present events. Dr. Flicker visited the patient here over the weekend. Psychological testing reported by Dr. Tarter, which was done on May 20th, indicated evidence at the present time of a clinical organic psychosis. There is evidence of personality disorganization with symptoms manifested in the cognitive, affective and behavior spheres of functioning. His mentation is impaired. His thoughts take on distinct paranoid trends and there are hallucinations of an organic type such as flashes of color and perceptual distortions with body figures increasing and decreasing in magnitude. He has hallucinations. His thinking is extremely concrete and unable to perceive abstract relationships or meanings of proverbs. He shows partial disorientation and memory deficits with unstable affect and periodic moodiness and disinhibition of affect with transient depressions. Self-control is poor and there are elements of unpredictability in his behavior. Dr. Tarter feels that it would not be prudent to assess his I.Q. at this time insofar as his

intellectual potential is severely reduced by his organic condition. His confusion further elevates his anxiety which in turn adds further to depression and inability to function. Although he denies feeling nervous, he is in fact quite tense and preoccupied about his condition with elements of despair.

Frank P. Spitzer, M.D./jt

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EXAMINATION OF OCT. 16, 1974

(The following was dictated after the close of trial by Samuel Rosner, M.D., to the court reporter.)

DR. ROSNER: "The following reports were reviewed: N. Kritzberg, M.D.; F. Brown, Ph.D. (clinical psychologist); R.A. DiNapoli, M.D. (Columbia); K. H. Brookler, M.D.; Alphonso J. Orrico, Ph.D. (psychology); Geoffrey F. Osler, M.D.; M. L. Stein, Ph.D. (psychology); and F. S. Gagliardi, M.D.; telephone conversations with Bellevue physician — Sunday, October 13, 1974, following fall in West Street jail — Dr. Nikongo, M.D. (Bellevue) — (permission was not granted to me by Bellevue Hospital administrator to examine patient while he was in Bellevue emergency ward on 10/13/74.)

"Patient's previous history and findings were reviewed from the above reports. Dr. Nikongo of Bellevue and I had two or three telephone conversations concerning the head injury following a fall which the patient sustained at West Street jail. The doctor stated that the patient felt that an attempt was made on his life, and that he had been pushed. He was disoriented and confused, according to Dr. Nikongo.

"At present, the patient is confused but was fairly cooperative. He is under the impression that he is suffering from the effects of the tugboat accident, which he thinks occurred recently, but which actually occurred a number of years ago.

"Previous examiners concluded that the patient had organic brain injury, was borderline mentally defective and was probably suffering from epilepsy. He was placed on Dilantin, which is a medication used to prevent epileptic attacks.

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"Neurological findings: 1) Blood pressure, 155/95 (bilaterally), pulse rate equals 78 per minute; 2) patient is confused (see foregoing); 3) oculogyric movements on upward gaze; 4) nystagmoid movements — occasional — on lateral gaze; 5) tongue deviates to the left; 6) palatal reflex shows some pull to the right; 7) deep reflexes are hyperactive in all limbs — some spasticity on the left; 8) abdominal reflexes hypoactive on the left; 9) equivocal Babinsky reflex on the left; 10) past pointing (with Rombergism) — bilateral; 11) weakness in left hand grip; 12) confusion in judging numbers written on palms.

"Opinion: This patient is suffering from injury to the base of his brain and is borderline mentally defective. It is likely that this patient is suffering from epilepsy and that his fall in the West Street jail, wherein he again injured his head, was due to an epileptic attack causing further cerebral trauma.

"The overall picture confirms the previous opinions of neurologists, psychiatrists, psychologists and neurosurgeon (Dr. E. Schlessinger, Columbia); namely: organic brain injury, borderline mental defective, and epilepsy.

"The patient at present shows exacerbation of his previous neurological picture. In all likelihood these findings are due to the head injury suffered in the West Street jail on October 13, 1974 and the prior weeks.

"Conclusion: I am of the opinion that this patient cannot adequately participate in his defense because of the neurological damage which he has sustained.

"Samuel Rosner, M.D., 109 Mildred Parkway, New Rochelle, New York, 10804. 10/16/74."

Chart No. 17-94-00-4

HOSPITAL Bellevue

ADMISSION RECORD

Surname	First	Middle	Sex	Age	Date of Birth	Date Admitted	Ward or
Alleyboi	John		M	44	12-5-32	10-14-74	N02
Permanent Address			Nativity		Color	Other (Specify)	Marital St
186 Ave. C Bayonne, N.J.					W. ☐ N. ☐		S. M. W. D
Occupation			Dates of Previous In-Patient Admissions				
Meat Hdlr							

FOR IN-PATIENT SERVICE ONLY

On discharge record the following data: Use Terms and Codes of Standard Nomenclature

Date discharged _____ Condition: Improved ☐ Unimproved ☐ Not Treated ☐ A.O.R. ☐ D

Final diagnosis: Main Condition _____ Code No. _____

Additional Conditions _____ Code No. _____

_____ Code No. _____

Service _____ Visiting Dr. _____ House Dr. _____

In the following report include: FAMILY HISTORY: hereditary conditions and causes of family deaths.
PREVIOUS HISTORY: habits, occupation, childhood diseases, other diseases, operations and injuries.
PRESENT CONDITION: Date and mode of onset, possible cause, course, and review of systems. For trauma, include cause and time of injury.

10/14/74

42 yo. WM c/o ~~[illegible]~~ changes Bypass

Lid irritated, watered, claims to be [illegible]

~~[illegible]~~ irritated. Claims that he cannot

~~[illegible]~~ with R eye

~~[illegible]~~ possible S/E ~~[illegible]~~ hydrated tabs...

~~[illegible]~~ c/o ons

Date 10/14/74 Signature [signature]

NEW YORK CITY HEALTH AND HOSPITALS CORPOR

HHC Form 136-7 (May 73)
Replaces AR 5001

Appendix M

1817

PSYCHIATRIC CONSULTATION AND OPINION

(5) (2)

CONSULTATION NOTE BY DR. (print name) Dr. ROSEN:

said [illegible] and he is surprised that I claim [illegible] of. He believes that blind people can, and that it is not an hallucination. He also claims to see red + blue patterned lights - not appropriate figure but projected reach. He also claims to see large moving spiders from the walls and lights above his bed - there are none.

M.S. cooperative, frightened Caucasian in NAD. Speech - coherent, relevant, logical, delusional, hallucinating - no evidence of thinking disorder. Affect - frightened - mood - nl. depressed. Orientation - poor - respect to place + time - adequate to respect to person.

Memory - immediate recall good -
recent past - nil.
distant " intact - good.

I + I - poor - intellectual functioning - adequate

Impression: (1) Retinopathia does not at this point appear to be a likely diagnosis due to absence of any indication of a thinking disorder + due to the apparent good ego function needs of pt's life.

(2) Due to multiple head injuries + possible brain damage (post traumatic hallucinosis to brain damage with [illegible]) organic factors appear to be likely -

Recommendations:

(3) An [illegible] electroencephalographic process may be going on due to cerebral induced light stress

(4 p.3)

Date | Signature | Title

362a M.D.

S.R. 1611

10/19/74

PSYCHIATRIC CONSULTATION AND OPINION

(5)

CONSULTATION NOTE BY DR. (print name) ROTROSEN -

42 y.o. w.m. admitted to E.D. 10/18/74 & head trauma a Fed House of Detention where he fell or was pushed (?). Pt is currently clear neurologically, but still appears to be suffering pain + confusion + psychotic symptomatology. He is apparently in FHD on $500,000 bail for a large narcotics related drug deal, and according to the nurse there is a $1,000,000 contract on his life - He is being guarded by Fed. Marshalls. He is lying quietly in bed and is appropriate no manageable problem at present.

The pt believes that today is April 4, 1969 and that he was just been rushed to the hospital by ambulance after falling off a tugboat in a collision & barge - this is Jersey City Medical Center. Pt believes he is 37 y.o. states he was born Dec. 5, 1932 and that other events surrounding him in time are related to 4/4/69. He has been seeing a psychiatrist on 57th St named Dr. Kurschburg since 1967 for about 2 yrs - he has been helping pt & problems from brain damage resulting from numerous head trauma - Pt claims he has been a boxer and has had numerous head injuries requiring hospitalization

He was born & raised in Bayonne N.J. - finished [illegible] yrs of school and claims he has worked all his life

Recommendation:

doesn't believe that there is anyone following him or that he is being persecuted in any way.

He claims to be hearing voices - told pt. to try not to worry that he'll get better, and alternatively that he should trust anyone. The voice is [illegible]

Date	Signature	Title
	363a M.D.	

Chart No. 47-04-00-4 (3)
HOSPITAL. Bellevue

PROGRESS RECORD

Name Degilio, John Admitted 10-13- 1974 Ward Eu/6

Observations and Opinions of Visitings, Consultants and House Staff.
A Final Discharge Note Must Be Entered on This Sheet. Sign and Date Every Entry.

10/13/74 Neurosurg.

42 y.o. ♂ c̄ hx of falling down some stairs earlier today. ? trauma to head &/or spine. Not known whether or not pt. lost consciousness. Brought here allegedly complaining of neck & back pain. On P.E.:

Gen'l = ō obvious external signs of trauma
Cerebrum = awake & alert – disoriented to place & time – actively hallucinating (visual → unformed colors) – no apparent dysphasia
Cerebellum = ō tremor or nystagmus – does not cooperate for F→N testing
CN = II-XII intact, discs flat
Motor = moves all 4 extremities equally & c̄ good strength
Sensory = not reliable
Reflexes =

	BJ	TJ	KJ	AJ	Plantars
(R)	2+	2+	3+	2+	↓
(L)	2+	2+	3+	2+	↑

(over →)

Continue Notes on Other Side

Appendix M

DAVID ABRAHAMSEN, M.D., F.A.C. Pn.
1035 Fifth Avenue
New York, N.Y. 10028

EDUCATION AND TRAINING:

1929

Medical degree from the Royal Frederick University, Oslo, Norway

1931-32

Internship, Royal Norwegian Clinics of the Royal Frederick University, Oslo

1932-36

Residency in Psychiatry and Neurology, Psychiatric Clinic of the Royal Frederick University, Oslo

1934-36

Supervisor, Director, Children's Home, Oslo

1936-37

Tavistock Clinic and with Dr. Bronislaw Malinowski at the London School of Economica

1938

Approved as specialist in psychiatry and neurology in Norway

1940-41

Psychiatrist under Dr. Winfred Overholser, Saint Elizabeth's Hospital, Washington, D.C.

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1941-42

Psychiatrist, Diagnostic Depot, Illinois State Penitentiary

1943

Licensed in the State of New York and as a Qualified Examiner by the University of the State of New York

1943-44

Psychiatrist at Bellevue Hospital, Psychiatric Division, New York City

1944-47

Personal psychoanalysis with Gustav Bychowski, M.D., control analysis with George Gero, M.D.

1947

Diplomate in Psychiatry of the American Board of Psychiatry and Neurology

RESEARCH:

1943

Research Associate in Psychiatry, Menninger Clinic and Southard School, Topeka, Kansas

1944-53

Research Associate, Columbia University, Department of Psychiatry

1944-48

Director in Charge of Research and Treatment of Behavior Disorders in Children and Their Families,

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Supported by a $40,000. grant from the Josiah Macy, Jr. Foundation, Psychiatric Institute, New York, N.Y.

1948-52

Director of scientific research for Department of Mental Hygience, New York State, at Psychiatric Institute, New York City

1952-55

Director in charge of research project on child guidance and mental hygiene facilities available in public and private schools, Department of Psychiatry, Columbia University

1948-52

Director of scientific research at Sing Sing Prison

1953

Chairman, Research Committee, Home Term Court, New York City

TEACHING:

1943-53

College of Physicians and Surgeons, Columbia University, Department of Psychiatry

1949-50

Yale Law School

1955-56

New York School of Social Work, Columbia University

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1959-61

Visiting Professor, Graduate Faculty of Political and Social Science, New School for Social Research, New York City

APPENDIX N — 18 U.S.C.S. §4244

Mental incompetence after arrest and before trial. Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation. The United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination, the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. (Added Sept. 7, 1949; ch. 535, §1, 63 Stat. 686.)

FILED
JAN 15 1981

No. 80-381

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-381

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the government must prove beyond a reasonable doubt that petitioner is competent to stand trial and to be sentenced.

2. Whether the evidence was sufficient to support the district court's finding that petitioner was competent to be resentenced.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. C) is reported at 538 F. 2d 972. The order of the court of appeals (Pet. App. J) following remand to the district court is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. J) was entered on July 15, 1980. A petition for rehearing (Pet. App. K) was denied on August 6, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of New Jersey for conspiracy to defraud the United States (18 U.S.C. 371) and conversion of photocopies of official FBI files (18 U.S.C. 641). Prior to trial, petitioner moved pursuant to 18 U.S.C. 4244 for a determination of his competency to stand trial. The district court directed petitioner to report to a clinic to be examined as to his competency. Following petitioner's examination by several doctors, the district court held an extensive hearing on the competency question.

1. The evidence at the pretrial hearing showed that petitioner had been a professional boxer during the 1950's, and that he had suffered a series of knockouts. The evidence further showed that petitioner had suffered blows to the head during a tugboat accident, an auto accident, and a fall while in custody (Pet. App. 8a-9a, 18a). Two factual issues predominated at the competency hearing: (1) the extent to which petitioner's mental processes were affected by any organic brain damage that might have resulted from his various head injuries; and (2) whether petitioner had malingered or purposely misled the medical witnesses as to his true abilities during his clinical observation period.

The district court found that petitioner functioned in the low normal range of intelligence, and that his somewhat lower test scores were due to his failure to make a bona fide attempt to do well when tested (Pet. App. 16a-17a). The court observed that petitioner had lived alone, or perhaps with one other person, in a New York apartment until the recent past, and that he had been able to manage his own affairs (Pet. App. 18a). The court further noted that none of petitioner's electroencephalograms showed any diffuse or focal brain abnormality (Pet. App. 19a). The court concluded that petitioner had some organic brain disorders,[1] but that his functioning at a mildly retarded level was to a certain extent simulated (Pet. App. 20a). Applying the competency test enunciated in *Dusky* v. *United States*, 362 U.S. 402 (1960), the court found that petitioner was able to consult with his lawyer, and that petitioner had a rational and factual understanding of the proceedings against him (Pet. App. 8a, 24a).

2. Petitioner was thereafter tried by a jury. He was convicted on both counts and sentenced to nine years' imprisonment. The trial evidence showed that petitioner had been the subject of an FBI investigation concerning loansharking and extortion between 1970 and 1972, and that he had procured the unauthorized copying of FBI documents relating to that investigation. The documents were photocopied by Irene Klimansky, an FBI clerk-typist, who delivered the copies to her fiance, George Kuczynski. He then delivered the copies to petitioner through certain intermediaries. Over the course of the several months in which these transactions occurred, Kuczynski was paid more than $1,000 for the documents (Pet. App. 29a-30a). At trial,

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[1]The court noted, however, that the medical records "very clearly" showed that "Mr. DiGilio's symptoms of organic brain disease are almost entirely subjective" (Pet. App. 19a).

petitioner never challenged his competency to commit the crime. Petitioner contended, however, that he was not receiving a fair trial, claiming that the court had changed juries during the trial (Pet. 8).

On direct appeal, the court of appeals held that the government must prove competency by a preponderance of the evidence, and that the district court had erred by placing the burden upon petitioner (Pet. App. 31a-38a). Thus, the case was remanded to the district court for a new competency determination and, if necessary, for the taking of further evidence on that issue (Pet. App. 38a-39a). The court of appeals further held that petitioner would have to be resentenced on the substantive count in any event because the trial evidence was insufficient to prove that the purloined records had a value in excess of $100, and petitioner should therefore have been sentenced under the misdemeanor rather than the felony provision of 18 U.S.C. 641 (Pet. App. 39a-40a).

3. On remand, the district court reviewed the record of the pretrial competency hearing and held that the government had proved petitioner's competency to stand trial by a preponderance of the evidence (Pet. App. 43a-56a). The court specifically found that petitioner's statements during trial concerning the changing of juries "was another attempt on his part to avoid trial by simulation of mental illness" (Pet. App. 54a).

Petitioner then challenged his competency for resentencing purposes. After a lengthy evidentiary hearing, the court again held that the government had proved petitioner's competency by a preponderance of the evidence. Petitioner based his incompetency claim on the presence of an organic brain condition that had allegedly worsened since trial. Specifically, petitioner claimed that the head injuries he had suffered as a boxer had resulted in a blood vessel abnormality known as an angioma. Petitioner's chief witness, Dr. Rosner, testified that stress may cause the engorgement of

blood vessels at the site of the angioma, which may induce an epileptic seizure. Dr. Rosner further testified, however, that petitioner would return to normal when the engorgement subsided (Pet. App. 62a-63a). The court credited the testimony of other medical specialists who found no angioma through a brain scan and who further testified that, if petitioner did have a brain lesion, it was on the nondominant side (Pet. App. 66a-71a). The court found petitioner to be competent on the ground that petitioner was "able to confer with his counsel in such a way that he can understand that a sentencing proceeding involves the concept of punishment" (Pet. App. 72a-73a). The court then resentenced petitioner to nine months' imprisonment. The court of appeals affirmed (Pet. App. 89a-92a).

ARGUMENT

1a. Petitioner's contention (Pet. 17) that competency to stand trial or to be sentenced must be proved beyond a reasonable doubt is without merit. It is well settled, of course, that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime charged." *Mullaney* v. *Wilbur*, 421 U.S. 684, 685 (1975). Accord, *In re Winship*, 397 U.S. 358 (1970). Competency to stand trial or to be sentenced, however, is not an element of the offense. Unlike the defense of insanity, competency does not relate to the defendant's mental state or intellectual capacity at the time of the offense.[2] Competency relates only to the defendant's condition at the time of trial, long

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[2]While the prosecution bears the burden of establishing a defendant's sanity in a federal prosecution (see *Davis* v. *United States*, 160 U.S. 469 (1895)), the Constitution permits the burden of proof on the issue of sanity to be placed on the defense. See *Leland* v. *Oregon*, 343 U.S. 790 (1952); *Rivera* v. *Delaware*, appeal dismissed for want of a substantial federal question, 429 U.S. 877 (1976).

after the crime has been completed. The question of competency is therefore wholly collateral to the question of guilt. The result of a competency determination is that the defendant must stand trial; the determination does not, in and of itself, bring about a loss of liberty. Compare *Addington* v. *Texas*, 441 U.S. 418 (1979).

Although a defendant's competency to assist in his defense may affect the outcome of the trial, it is well settled that the government is not required to prove beyond a reasonable doubt the facts underlying all collateral matters that may ultimately affect the verdict. For example, the voluntariness of a confession need only be proved by a preponderance of the evidence. See *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972). Likewise, the defendant must bear the burden of proving a violation of his Fourth Amendment rights before he will be entitled to the suppression of the fruits of an illegal search or seizure. *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980) slip op. 6.[3] Due process requires that a defendant not be tried unless he is proved to be competent (*Drope* v. *Missouri*, 420 U.S. 162 (1975); *Dusky* v. *United States*, 362 U.S. 402 (1960)), but that requirement will be satisfied if the government proves competency by a preponderance of the evidence, as it did here. See *United States* v. *Hollis*, 569 F. 2d 199, 204 (3d Cir. 1977); United States v. Makris, 535 F.2d 899, 906-907 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977).

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[3]Petitioner's reliance (Pet. 19-20) on *Chapman* v. *California*, 386 U.S. 18 (1967), is misplaced. In *Chapman*, the Court held that a conviction must be vacated when it has been established that the trial was infected by constitutional error, unless the government proves beyond a reasonable doubt that the error did not taint the verdict. *Chapman* does not hold that the government must prove beyond a reasonable doubt that the trial was free of constitutional error. In some circumstances, as *Rawlings* shows, the defendant bears the burden of establishing a constitutional violation.

b. Petitioner suggests, alternatively, that competency should be proved by at least "clear and convincing" evidence. In making this claim, he relies on *Addington* v. *Texas*, *supra*, which held that an individual may not be committed involuntarily to a state mental institution unless that standard of proof has been met. There is a fundamental difference, however, between a civil involuntary commitment proceeding and a criminal competency hearing. While the purpose of the former is to determine whether an individual should be deprived of his liberty, the purpose of the latter is to determine only whether a criminal defendant must stand trial. The criminal defendant will not lose his liberty unless his guilt is subsequently proved beyond a reasonable doubt. Because a defendant's liberty is not directly at stake in a competency hearing, the preponderance of the evidence standard suffices to insure that only those defendants who can understand the nature of the proceedings and assist in their defense will be tried.

Petitioner cites no case suggesting that any other court of appeals disagrees with the standard applied in his case. There is accordingly no reason for further review of the issue.

2. Petitioner mischaracterizes (Pet. 12-17) the district court's finding by contending that the court erroneously based its determination that he was competent to be resentenced on his failure to prove the physiological cause of his incompetence. Petitioner's chief witness, Dr. Rosner, testified that petitioner could not withstand the trauma of a resentencing hearing because he suffered from an angioma that becomes engorged during times of stress, which might cause petitioner to have an epileptic seizure. Dr. Rosner also testified that petitioner would return to normal when the engorgement ceased (Pet. App. 63a). The remaining witnesses testified that petitioner did not suffer from an

angioma. The court thus discredited Dr. Rosner's testimony (Pet. App. 66a-71a).

The court had already determined that petitioner was competent to be tried, a finding that is not challenged here. The district court observed petitioner during the trial, the initial sentencing hearing, and the lengthy resentencing-competency hearing. Based on all the evidence, the court concluded, "I am convinced that the [petitioner] is able to confer with his counsel in such a way that he can understand that a sentencing proceeding involves the concept of punishment" (Pet. App. 72a-73a). The court thus found petitioner competent to be resentenced (Pet. App. 71a-73a). This factual determination, in which the court of appeals concurred, does not warrant further review. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

DOJ-1981-01

No. 80-381

In The

FEB 12 1981

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN DI GILIO, PETITIONER

-vs-

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REBUTTAL TO GOVERNMENT'S STATEMENT

The Government has constructed an erroneous "Statement" of the case. It contends that the two factual issues at the competency hearing were (1) the extent of petitioner's mental disability resulting from organic brain damage which might have been caused by head injuries, and (2) the issue of malingering (Resp. 1).

The first so-called issue begs the question in exactly the same way the trial judge did: by making any finding of incompetence dependent on petitioner's ability to prove causal organic brain damage. The correct issue should have been whether petitioner was incompetent under the Dusky standard <u>regardless of his ability to prove cause</u>. The Government has thus misframed the issue to subsume the very error of which petitioner complains: that the trial judge put the burden on petitioner to prove a <u>cause</u> of incompetency rather than on the Government to prove the <u>fact</u> of competency under Dusky.

The evidence and findings demonstrated that there was no malingering. All the doctors considered and ruled out the possibility of malingering (Pet. 5). The Government does not attempt to address the portions of the record supporting petitioner's assertion. Indeed, the trial judge acknowledged that petitioner suffers from "some form of organic brain damage" (Pet. App. 20a) and that he is "extremely mentally deficient" (6/19/75, T.72). Nor does the Government attempt to rebut the overwhelming evidence cited in the Petition to describe the objective as well as subjective symptoms of petitioner's disorders (Pet. 3-5).

There was no malingering in the ordinary sense in this case. The only issue in this vein was whether petitioner demonstrated -- as a symptom of his mental deficiency -- an unwillingness to do his best on certain tests in order to protect his ego by not having to face up to the truth that his best efforts are dismally poor. The trial judge recognized this:

> He tests lower than his actual mental capacity. The reasons for this are complicated as set forth in my findings on June 19, 1975. To state his situation briefly, DiGilio refuses to extend his best efforts on testing, fearful that if he did so he would do poorly and would then have to recognize his limited intellectual capacity. Doing poorly on tests after not trying to do well gives him ego protection against the stigma of the results.
> (Pet. App. 53a)

The only finding that there was simulation in any culpable sense was the trial judge's determination that petitioner's claim that the jurors were being changed on him during the trial was false. But this was based on a clear misstatement of the record by the trial judge in that petitioner did have a medical history of hallucinatory behavior (Pet. App. M). The determination was also made without any hearing on the thing amiss; the trial judge did not even inquire about it prior to making his findings and petitioner had no opportunity to be heard or to direct the court's attention to those portions of the medical record which would have prevented the error.

The Government's description of the criminal activity "revealed" by the evidence at trial (Resp. 2) also begs the question since the very issue on the Petition is the reliability of the fact finding process where petitioner's ability to defend himself is lacking. As this court stated in **Drope v. Missouri, 420 U.S. 162,** the prohibition against trying such an individual is "fundamental to an adversary system of justice" because akin to a trial in "absentia" since the defendant "is in reality afforded no opportunity to defend himself" **(420 U.S. 170-172).**

The Government's Statement goes on to unilaterally designate Dr. Rosner as petitioner's "chief witness" (Rb3). The basis for this designation is not revealed. Certainly, it does not come from petitioner's contentions. Petitioner summarized his expert testimony in an appendix to the Court of Appeals and placed Dr. Rosner 7th in a list of 9 organized in descending order of significance with psychiatrist Abramson (of Son of Sam fame) in the lead and Dr. Feinberg, a general practitioner, last (Pet. Supp. App. A).

In fact, a discussion of Dr. Rosner's testimony took up only one out of 23 pages of defendant's preposed fact findings submitted to the trial judge.

Designation of Dr. Rosner as petitioner's "chief witness" is clearly a ploy to bootstrap the Dusky issue by the simple expedience of assuming that petitioner's ability to prove the cause of incompetence is the "Chief" issue -- the very premise petitioner challenges.

LEGAL ARGUMENT

POINT I

THE GOVERNMENT HAS FAILED TO MEET PETITIONER'S ARGUMENTS CONCERNING THE DISTRICT COURT'S MISAPPLICATION OF DUSKY

The Government's brief completely avoids the issues raised by petitioner. It claims that petitioner mis-characterizes the trial judge's findings but fails to acknowledge, much less address the judge's own words in which he stated that:

> ...I find that the determinative testimony comes essentially from those witnesses who could testify knowledgeably about the claimed root cause of the defendant's problems -- his organic brain disease. (emphasis supplied) (Pet. 13).
>
> * * *
>
> Because I find the testimony of Dr. Somberg more credible than that of Dr. Rosner, that there exists no discernible angioma in the right parietal area, and if such a lesion did exist it would be on the non-dominant side, thus not affecting the intellectual ability and personality of defendant,

> the psychiatric and psychological evaluations made by the defense witnesses becomes incidental to the determination. (emphasis supplied) (Pet. 14).
>
> * * *
>
> The evidence presented in this de novo competency hearing preponderates in favor of a finding that John DiGilio does not suffer from the kind of organic brain disease which he has asserted as the basis for an alleged incompetency to be resentenced. Without that organic disease linchpin, the carefully perceived functional overlay becomes too transparent a structure to support the defendant's theory. (Pet. App. 74a) (emphasis supplied)

This, and the other quotations cited in the Petition (p.12-15), demonstrate a clear circumvention of the Dusky standard.

The Government's tack consists of trying to obscure the trial judge's error by shielding it with identical error. Without any justification whatever, the Government unilaterally proclaims Dr. Rosner as petitioner's "chief witness" (Rb. 6) and then says since the judge disbelieved him, the ruling was correct. Dr. Rosner was no more petitioner's "chief witness" than causality super-

cedes the fact of incompetency under Dusky. Indeed, in the first hearing on the issue of capacity to be tried, neither Rosner nor any angioma theory of causality was even presented. The evidence at that hearing consisted of mainly the three psychiatrists who testified as to petitioner's capacity (two said he was incompetent and one said he didn't know).

When Dr. Rosner was presented in the second competency hearing, his position as a witness on the purely collateral issue of causality was clearly reflected in the Summary of Expert Witnesses attached to petitioner's Court of Appeals brief in which Dr. Rosner is listed 7th behind 3 other categories of expertise listed in declining order of importance (psychiatry, first, and general practice, last) (Pet. Supp. App. A). As noted, the entire discussion of Dr. Rosner's testimony in defendant's proposed findings of fact took up only one page out of 23.

Moreover, regardless of nomenclature, the simple fact is that the trial judge disregarded all psychiatric and psychological testimony that

petitioner was incompetent by the Dusky standard and based his findings on petitioner's failure to convince him that angioma was the cause of incompetence (Pet. App. 62a, 74). The Government never even attempts to come to grips with this key issue. The reason is simple: the trial judge did in fact put the burden of proof on petitioner to prove the cause of incompetency. He did, in fact, circumvent the issue of the existence of competency (regardless of cause) pursuant to Dusky and he did this against a record in which he acknowledged the existence of organic brain disease and the Government could not produce a single psychiatrist or psychologist upon which the court could rely to testify that petitioner was competent under Dusky (Pet. Supp. App. A).

The Government's response to the Petition is further erroneous in its assertion that petitioner does not challenge the competency to be tried determination (Resp. 7). Petitioner has challenged that determination by arguing that the court applied the wrong standard of proof. (Pet.

17).

In addition, the Government notes that the district court "observed" petitioner during the proceedings and concluded that competency existed (Resp. 7). The Government apparently suggests that the trial judge's determination is supportable by lay observations outside the record. Such an approach is not only unfair, but is nonreviewable and hence impermissible.

POINT II

COMPETENCY TO STAND TRIAL OR BE SENTENCED MUST BE PROVEN BEYOND A REASONABLE DOUBT

The Government has missed petitioner's point that, insofar as the integrity of the fact finding process is concerned, the issue of competency is different in kind rather than degree from other trial issues which may affect reliability of the outcome. So long as the defendant is mentally competent he has the time tested efficacy of the adversary system to uncover and correct any violation of his rights. But when a defendant is not competent, the adversary system is unavailable to safeguard any of his rights. In such a case, it works only to mask a trial in "absentia" with outward legitimacy.

The Government fails to squarely meet petitioner's contention that a defendant cannot be found guilty of a crime beyond a reasonable doubt if there is a reasonable doubt as to his ability to defend himself. The Government's at-

tempt to minimize the issue by analogy to search and seizure cases and confession cases is unpersuasive since, regardless of any other consideration, they go to a single aspect of the proofs against which a competent defendant may effectively defend.

Moreover, the example of suppression of evidence seized in violation of the Fourth Amendment is totally inapposite since the purpose of the exclusionary rule is to safeguard the integrity of law enforcement procedures and not the fact finding process. Indeed, to the extent that the exclusionary rule interferes with the fact finding process, it does so in a way favorable to the defendant.

Similarly, the issue of a confession goes only to a single aspect of the proofs. Even in a worst case scenario a defendant still has his faculties intact to work with counsel in overcoming any disadvantage. For example, the erroneous admission of a false confession can be offset by defendant's effective presentation of an alibi or other collateral facts or inferences rebutting

either guilt or the confession.

The Government's attempt to distinguish **Addington** by complaining that a finding of incompetency to be tried or sentenced will not necessarily result in a loss of liberty is unpersuasive. It would be singularly ironic to require civil commitment as the inescapable price for protection against loss of liberty resulting from an unfair trial. Moreover, the Government's position is undercut, in a very practical sense, by the procedures required by **18 U.S.C. §4246** which provides that, upon a finding of mental incompetency "...the court may commit the accused to the custody of the Attorney General or his authorized representative until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." The section makes provision for further commitment depending upon the defendant's mental condition (Pet. Supp. App. B). Thus, the Government fails to recognize that any defendant found incompetent to be tried risks loss of liberty. Certainly, there is enough enlightened room

in our system to give more than grudging currency to the concept of presumption of innocence.

Lastly, the Government's contention that there is no authority for utilization of the reasonable doubt standard in competency proceedings is erroneous. See U.S. v. Lancaster, 7 Bissell 440, 443 (7 Cir. 1877) and U.S. v. Chisolm, 148 F. 284 (D.C.S.C. Ala., 1906), Cf. U.S. v. Makris, 535 F.2d 899 (5 Cir. 1976).

CONCLUSION

For the above reasons, it is respectfully requested that the within Petition be granted.

Respectfully submitted,

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Appendix

SUPPLEMENTAL APPENDIX A

MENTAL DEFECTIVES 18 U.S.C. §4246

§4246. Procedure upon finding of mental incompetency

Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title [18 USCS §§4244, 4245] that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 [18 USCS §§4244, 4245] shall determine that the conditions specified in the following section 4247 [18 USCS §4247] exist, the commitment shall be governed by section 4248 [18 USCS §4248] as herein provided.

(Added Sept. 7, 1949, ch 535, §1, 63 Stat. 687.)

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

DEFENSE

PSYCHIATRISTS

1. Abrahamsen-world renowned; based conclusion on observation & study notwithstanding exposure to tapes; Dusky standard used; testified for government in prior competency proceeding.

2. Latimer-extensive contact with patient; used Dusky standard; based conclusion on observation & study notwithstanding exposure to tapes; factually informed.

3. Kritzberg-extensive contact with patient; used Dusky standard.

4. Gagliardi-consistent with first proceeding; used recent testing; used Dusky standard.

PSYCHOLOGIST

Brown-evaluated patient since 1969; used Dusky standard.

NEUROPSYCHOLOGIST

Smith-independent testing

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

NEUROSURGEON

Rosner-extensive testing and objective findings; used Dusky standard.

INTERNIST

Thaler-extensive observation; objective findings.

GENERAL PRACTITIONER (EENT)

Feinberg-examined patient since 1954 on trauma injuries; confirmed peculiar behavior.

GOVERNMENT

PSYCHIATRISTS

1. Feldman-not board certified-factually uninformed; Dusky standard not used; on cross admits patient's lack of mental competency.

2. Flicker-prejudiced; factually uninformed; not considered in court's conclusion or fact finding; current opinion based solely on tapes contrary to opinion at first hearing.

SUPPLEMENTAL APPENDIX B

SUMMARY OF EXPERT WITNESSES FROM SECOND COMPETENCY PROCEEDING

COURT

NEUROSURGEON

Somberg-not psychiatrist; factually uninformed; on cross admits objective findings; Dusky standard not used.